TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 67.

MRS. ANNIE E. PENMAN, PETITIONER,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED FEBRUARY 1, 1908.
CERTIORARI AND RETURN FILED APRIL 1, 1908.

(21,001.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1909.

a In the United States Circuit Court of Appeals, Third Circuit.

No. —, October Term, 1906.

St. Paul Fire & Marine Insurance Company, Plaintiff in Error,
vs.
Mrs. Annie Penman, Defendant in Error.

Record.

W. K. Jennings, D. C. Jennings, Attorneys for Plaintiff in Error.
A. J. Truitt, B. M. Clark, Attorneys for Defendant in Error.

1 In the United States Circuit Court of Appeals, Third Circuit.

No. —, October Term, 1906.

St. Paul Fire and Marine Insurance Company, Plaintiff in Error,
vs.
Mrs. Annie Penman, Defendant in Error.

Among the rolls, records and judicial proceedings had in the Circuit Court of the United States in and for the Western District of Pennsylvania at No. 30 of November Term, 1905, may be found the following words and figures, to wit:

Docket Entries.

Mrs. Annie E. Penman
vs.
St. Paul Fire & Marine Insurance Company, a Corporation of the State of Minnesota.

Record from Court of Common Pleas of Jefferson County.

Docket Entries.

Summons in Assumpsit issued May 26th, 1905, returnable to the second Monday of June next.
Damages, $3,500.00.
May 29th, 1905, plaintiff's statement filed.

I, J. W. Curry, Sheriff of Jefferson County, Pa., do constitute and appoint J. S. L. Miles, Sheriff of Philadelphia County, Pa., my true and lawful deputy for me and in my name and stead to serve
2 the within summons on St. Paul Fire & Marine Insurance Company.

J. W. CURRY,
Sheriff of Jefferson County, Pa.

Served the St. Paul Fire & Marine Insurance Company, having an agency in the City of Philadelphia, Pennsylvania, under the laws thereof, by handing personally, June 1st, 1905, at the office of said Agency No. 328 Walnut street, in said city, a true and attested copy of the within writ to Louis M. Wagner, the attorney designated by said company under the laws of the State of Pennsylvania to receive the service of process.

So answers

JAMES L. MILES, *Sheriff.*

June 13th, 1905, notice to W. N. Conrad, attorney for defendant, of the filing of the plaintiff's statement, filed.

June 22nd, 1905, petition of defendant for removal of this cause to the United States Circuit Court, Western District of Pennsylvania, presented at chambers and rule to show cause granted returnable July 3rd, 1905. And now, June 22nd, 1905, upon request of counsel for defendant the rule to show cause this day granted is revoked and said application is ordered to be filed, and thereupon and upon motion of W. N. Conrad, Esq., of counsel for the applicant, it is ordered that the bond be approved and the said cause be removed to the Circuit Court of the United States for the Western District of Pennsylvania. Same day bond in the sum of two thousand dollars approved and filed.

1905, August 28th, Record received and filed in U. S. Circuit Court for the Western District of Pennsylvania.

1905, September 16th, Affidavit of Defense filed.

1905, September 28th, Plea filed.

1905, Oct. 10th, Præcipe for issue filed.

And now, December 7th, 1905, the parties to this cause being at issue, a jury being called came, viz: Alex. Beltzhoover, Jesse Bolsinger, Leslie Hartley, Martin Gibson, J. W. Ambrose, William Davis, Otto Wittman, Louise H. Herbert, P. C. Harbaugh, H. H. Byers, R. A. McConnell, and James A. McKinney, twelve
3 good and lawful men who having been duly summoned and returned were balloted for, impanelled and sworn to well and truly try this issue joined and a true verdict rendered according to the evidence.

1905, December 8th, the jury having agreed and being called do say: "We find for the plaintiff in the sum of $2,756.00" and so say they all.

1905, December 8th, Plaintiff's Witness Bill filed.

1905, Dec. 12th, Motion and reasons for a new trial allowed to be filed and rule granted returnable January 18th, 1906.

1906, February 26th, Opinion filed refusing motion for a new trial and directing judgment on the verdict and judgment is hereby entered accordingly.

H. D. GAMBLE, *Clerk.*

1906, April 9th, Assignments of Error, Petition for Writ of Error, and order allowing same, appeal and order approving same and citation filed.

Service of citation accepted Aug. 25th, 1906, for deft. in Error by A. J. Truitt.

Præcipe for Summons.

Issue Summons in Assumpsit in the above stated case. Ret. 2nd Monday of June next. Damages claimed $3,500.00.

A. J. TRUITT,
Attorney for Plaintiff.

4 *Summons.*

STATE OF PENNSYLVANIA.
Jefferson County, ss:

The Commonwealth of Pennsylvania to the Sheriff of said County, Greeting:

We command you that you summon Saint Paul Fire and Marine Insurance Company, so that it be and appear before our Court of Common Pleas to be held at Brookville, in and for said County, on the second Monday of August, next, to answer Mrs. Annie E. Penman in a plea of Assum-sit. Damages claimed, $3,500.00, and have you then and there this writ.

Witness, the Hon. John W. Reed, President Judge of our said Court at Brookville, the 26th day of May, in the year of our Lord, 1905.

CYRUS H. BLOOD,
Prothonotary.

Served the Saint Paul Fire and Marine Insurance Company, the within named defendant, an Insurance Company incorporated under the laws of the State of Minnesota, and having an agency established in the City of Philadelphia, in the State of Pennsylvania, under the laws thereof, by handing personally June 1st, 1905, at the office of said agency, No. 328 Walnut Street, in said city, a true and attested copy of the within writ to Louis M. Wagner, the attorney designated by said company under the laws of the State of Pennsylvania to receive the service of process.

So answers

JAMES M. MILES, *Sheriff.*

Sworn to and subscribed before me this — day of ——, 190–.

—— ——, *Pro.*

5 *Plaintiff's Statement.*

JEFFERSON COUNTY, *ss:*

The plaintiff in this action seeks to recover from the defendant the sum of two thousand six hundred dollars, with interest thereon from Dec. 7th, A. D., 1904, and for cause of action sets forth the following statement of facts:

That the defendant is an Insurance Company engaged in the fire insurance business, and is a corporation with legal authority to transact business in Pennsylvania.

That on the 4th day of November, A. D. 1904, the defendant company entered into a contract of insurance with the plaintiff whereby defendant agreed to insure plaintiff for a term of three years from the 4th day of February, A. D. 1904, at noon against all direct loss or damage by fire to an amount not exceeding twenty-six hundred dollars on a two story frame shingle roofed building 28x96 feet and additions, etc., to be occupied by tenants as dwellings and situate in Punxsutawney, Jefferson County, Pennsylvania, (in Elk Run addition in said Punxsutawney Borough), all as will fully appear by the said policy and which is therein specifically set forth. That the said policy of insurance is No. 1458 of defendant's Punxsutawney, Pa., agency, and was duly issued and delivered by the defendant to plaintiff, and the premium and charges duly paid by plaintiff to defendant—a true copy of said policy being hereto attached and made a part of this statement.

That on the evening of December 7th, A. D. 1904, an accidental fire occurred, which originated in said insured premises and by reason of said fire the said property of plaintiff covered by said policy of insurance consisting of said two story frame shingle roofed building 28x96 feet situate in Elk Run addition to Punxsutawney, Jefferson County, Pa., was directly consumed, damaged, injured
6 and totally destroyed and burned to the amount of exceeding $3,000.00 or more.

That in pursuance of the terms of said policy, defendant was wired notice of said fire and loss thereon by plaintiff on said evening of Dec. 7th, A. D. 1904, and by mail the following day Dec. 8th, A. D. 1904; and formal proofs of loss of said damages, and all as required by said policy, were made and forwarded to defendant company on January 31st, A. D. 1905, and duly received by defendant company Feb. 2nd, A. D. 1905, all of which notices and proofs of loss have been retained by defendant company.

That the time provided in said policy for the payment of said insurance has long since passed and although often demanded, the same has not been paid nor any part thereof, and therefore has this action been instituted by plaintiff to recover same from defendant. That the total amount of insurance on said property was the $2,600.00 represented by said policy, and the total loss exceeded the sum of $3,000.00 whereby the plaintiff is entitled to recover from the defendant the full amount of said policy to wit the sum of $2,600.00 with interest thereon from the date of said fire to wit: Dec. 7th, A. D. 1904.

May 26th, 1905.

A. J. TRUITT,
B. M. CLARK,
Attorneys for Plaintiff.

(Copy of Policy.)

No. 1458. $2,600.00

Saint Paul Fire and Marine Insurance Company, Saint Paul, Minnesota. Stock Policy. Incorporated 1865.

In consideration of the stipulations herein named, and of Sixty-five Dollars premium, does insure Mrs. Annie E. Penman for the term of three years from the 4th day of February, 1904, at
7 noon, to the 4th day of February, 1907, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Twenty-six hundred dollars, to the following described property while located and contained as described herein, and not elsewhere, to-wit:

Mrs. Annie E. Penman.

$2600.00 On a two story frame shingled roofed building 28x96 feet and additions, now in process of erection with privilege to finish, to be occupied by tenants as dwellings, situate in Elk Run, addition to Punxsutawney, Jefferson Co., Pa.

Permission to use natural gas for fuel and lights.

Lightning clause attached.

Prohibitory electric clause attached.

Loss if any first payable to Louis Wester as his interest may appear.

In consideration of an extra premium of Three and 90/100 dollars ($3.90) 30 days' permission is hereby granted to finish building.

Feb. 11, 1904.—Loan clause payable to Louis Wester is hereby withdrawn and now loss if any first payable to Louis Wester and Solomon T. Pifer as their interest may appear.

BROWN BROS., *Ag'ts.*

This policy shall cover any direct loss or damage caused by lightning (meaning thereby the commonly accepted use of the term "lightning" and in no case to include loss or damage by cyclone, tornado or windstorm) not exceeding the sum insured nor the interest of the insured in the property and subject in all other respects to the terms and conditions of this policy; provided, however, that if there shall be any other insurance on said property this company shall be liable only pro rata with such other insurance for any direct loss by lightning, whether such other insurance be against direct loss by lightning or not; and provided further that, if dynamos, wiring, lamps, motors, switches or other electrical appliances
8 or devices are insured by this policy, this company shall not be liable for any loss or damage to such property resulting from any electrical injury or disturbance, whether from artificial or natural causes, unless fire ensues, and then for the loss by fire only.

The use of electricity for lighting or power in the premises insu
under this policy, or containing the property hereby insured is p
hibited, unless the standard permit provided by the Middle Dep
ment Association be attached to the policy, or an additional rate
charged therefor equivalent to 25 per cent. of the annual rate,
in no case shall less than 25 cents be added to the existing rate.

This company shall not be liable beyond the actual cash value
the property at the time any loss or damage occurs, and the loss
damage shall be ascertained or estimated according to such act
cash value, with proper deduction for depreciation however caus
and shall in no event exceed what it would then cost the insured
repair or replace the same with material of like kind and quali
said ascertainment or estimate shall be made by the insured and t
company, or, if they differ, then by appraisers, as hereinafter p
vided; and, the amount of loss or damage having been thus de
mined, the sum for which this company is liable pursuant to t
policy shall be payable sixty days after due notice, ascertainme
estimate, and satisfactory proof of the loss has been received by t
company in accordance with the terms of this policy. It shall
optional, however, to take all, or any part, of the articles at su
ascertained or appraised value, and also to repair, rebuild or
place the property lost or damaged with other of like kind a
quality within a reasonable time, on giving notice, within thi
days after the receipt of the proof herein required, of its intent
so to do; but there can be no abandonment to this company of
property described.

This entire policy shall be void if the insured has concealed
misrepresented, in writing or otherwise, any material fact
9 circumstance concerning this insurance or the subject there
or if the interest of the insured in the property be not tru
stated herein; or in case of any fraud or false swearing by the
sured touching any matter relating to this insurance or the subj
thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement
dorsed hereon or added hereto, shall be void if the insured now h
or shall hereafter make or procure any other contract of insuran
whether valid or not, on property covered in whole or in part
this policy; or if the subject of insurance be a manufacturing
tablishment and it be operated in whole or in part at night later th
ten o'clock, or if it cease to be operated for more than ten consec
tive days; or if the hazard be increased by any means within the c
trol or knowledge of the insured; or if mechanics be employed
building, altering or repairing the within described premises
more than fifteen days at any one time; or if the interest of the
sured be other than unconditional and sole ownership; or if t
subject of insurance be a building on ground not owned by the
sured in fee-simple; or if the subject of insurance be personal pro
erty and be or become encumbered by a chattel mortgage; or if, w
the knowledge of the insured, foreclosure proceedings be commenc
or notice given of sale of any property covered by this policy
virtue of any mortgage or trust deed; or if any change, other th
death of an insured, take place in the interest, title, or possession

the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of insured or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises,

10 benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder, exceeding twenty-five pounds in quantity, naptha, nitro-glycerine, or other explosives, phosphorus, or

petroleum or any of its products of greater inflammability than kerosene oil of the United States standard, (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing

11 processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void.

This policy shall be canceled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender or this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company giving notice it shall retain only the pro rata premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new
12 location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in the new location or not.

If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall tender a statement to this company, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of the descriptions and schedules in all policies; any changes in the title, use, occupation, location possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes

the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

13 The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce all books of accounts, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to *to* the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination hereing provided for; and the loss shall not become payable until sixty days after the notice ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such

14 property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever

the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In Witness Whereof, This Company has executed and attested these presents this 4th day of February, 1904. This policy shall not be valid until countersigned by the duly authorized agent of the company, at Punxsutawney, Pa.

C. H. BIGELOW,
President.
A. W. PERRY,
Secretary.
BROWN BROS.,
Agents.

Notice of Filing Statement.

To W. N. Conrad, Esq., Attorney for Defendant:

You are hereby notified that plaintiff has filed her Statement of Claim in the above action.

A. J. TRUITT,
B. M. CLARK,
Attorneys for Plaintiff.

Brookville, Pa., June 12th, 1905.

Petition.

To the Honorable the Judge of said Court:

The petition of the Saint Paul Fire and Marine Insurance Company, respectfully set- forth:

First. That a summons in assumpsit was issued at the above mentioned number and term and served on the said defendant on June 1st, 1905.

Second. That the plaintiff, Mrs. Annie E. Penman, is a citizen of the State of Pennsylvania.

Third. That the defendant, the said Saint Paul Fire and Marine Insurance Company is a corporation existing under and by virtue of the laws of the State of Minnesota, and a non-resident of the State of Pennsylvania; and your petitioner is advised that it is en-
16 titled to have said cause removed to the Circuit Court of the United States for the Western District of Pennsylvania.

Fourth. That the amount in dispute exceeds two thousand ($2,000.00) dollars, exclusive of interest and costs, being twenty-six hundred ($2,600.00) dollars, with interest from December 7th, 1904, as set out in plaintiff's statement of claim. No costs have been incurred except the docket costs and costs of service, and your petitioner files herewith a bond in the penal sum of $200.00 with the United States Fidelity & Guaranty Company of Baltimore, Md., as surety, conditioned as required by the Act of Congress in that behalf; Wherefore, your petitioner respectfully prays your Honorable Court as follows, to-wit:

First. That said bond with said U. S. Fidelity & Guaranty Co., as surety, be approved.

Second. That an order be made removing the cause to the Circuit Court of the United States for the Western District of Pennsylvania, pursuant to the Act of Congress, and that the Prothonotary certify the record into said Court, and that no other or further proceedings may be had in this court, and it will ever pray, etc.

ST. PAUL FIRE & MARINE
INSURANCE CO.,
By DONALD M. MACPHERSON,
Special Agent.

STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, a Notary Public in and for said county, personally appeared Donald Macpherson, who being duly sworn deposes and says that he is agent of the St. Paul Fire and Marine Insurance Co., in this behalf, and is authorized to present the above petition,
17 and says that the statements contained in said petition are correct and true as he verily believes.

DONALD MACPHERSON.

Sworn to and subscribed this 12th day of June, A. D. 1905.
[SEAL.] D. C. JENNINGS,
Notary Public.

My commission expires April 3, 1910.

Bond.

Know all men by these presents that we, the Saint Paul Fire & Marine Insurance Company, a corporation duly chartered under the laws of the State of Minnesota, and having its domicile in the city of St. Paul, Minn., and the United States Fidelity & Guaranty Company, a corporation duly chartered under the laws of the State of Maryland, and having its principal office in the city of Baltimore,

are held and firmly bound unto Mrs. Annie E. Penman, of the city of Punxsutawney, County of Jefferson and State of Pennsylvania, in the sum of Two hundred ($200.00) dollars, for the payment whereof well and truly to be made unto the said Mrs. Annie E. Penman, her heirs and assigns, we bind ourselves, our successors and assigns jointly and severally by these presents.

Witness the signature of said defendant corporation, and the seal of said surety, this 12th day of June, A. D. 1905.

Whereas, the said Mrs. Annie E. Penman has begun an action of assumpsit in the Court of Common Pleas of Jefferson County at No. 144 August Term, 1905, against the said Saint Paul Fire & Marine Insurance Company in the sum of Twenty-six hundred ($2600.00) dollars, and

Whereas, the said defendant is about to present its petition
18 to said Court for the removal of said cause, to the Circuit Court of the United States for the Western District of Pennsylvania.

Now the condition of this obligation is such, that if the Saint Paul Fire & Marine Insurance Company, defendant in this cause, shall enter in said Circuit Court of the United States on or before the first day of its session after the date of an order directing the Prothonotory to certify the record into said court, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall hold that said suit was improperly or wrongfully removed thereto, then this obligation to be void, otherwise to be in full force and virtue.

ST. PAUL FIRE & MARINE
INSURANCE CO.,
By DONALD M. MACPHERSON, [SEAL.]
Special Agent.

Attest:
W. K. JENNINGS.

UNITED STATES FIDELITY &
GUARANTY —, [SEAL.]
GEO. S. GRAHAM, [SEAL.]
Attorney in Fact.

Order.

And now, June 22, 1905, upon request of counsel for defendant, the rule to show cause this day granted on the foregoing application, is revoked, and said application having been presented to me at chambers, the same is ordered to be filed and thereupon and upon motion of W. N. Conrad, Esq., of counsel for the applicant, it is ordered that the bond accompanying said application be approved and the said cause removed to the Circuit Court of the United States for the Western District of Pennsylvania, in accordance with the prayer of the applicant and the Act of Congress in such case made and provided.

JOHN W. REED,
Pres't Judge.

19 *Affidavit of Defense.*

WESTERN DISTRICT OF PENNSYLVANIA,
Allegheny County, ss:

Before me a Notary Public in and for said County, personally appeared Donald M. Macpherson, who being duly sworn, deposes and says that he is the special agent for the Saint Paul Fire & Marine Insurance Company, the defendant above named, is familiar with the facts, is authorized to file this affidavit of defense, and that the defendant above named has a just, full and legal defense to the whole of the plaintiff's claim, the nature of which is as follows, to-wit:

First. The policy in suit contains the following clause, inter alia:

"This entire policy unless otherwise provided by agreement indorsed thereon or added hereto shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 lbs., in quantity, naphtha, nitro-glycerine, or other explosives."

Deponent is informed and believes and expects to be able to prove upon the trial of this cause, that at and immediately before
20 the occurrence of the fire, which is alleged in the statement of claim to have taken place on the evening of December 7th, 1904, there was kept, used or allowed on the insured premises blasting powder or some other explosive differing essentially from gunpowder, without any provision allowing the same being provided by agreement indorsed on the policy or added thereto.

Second. Said policy also provides that,

"This company shall not be liable for loss caused directly or indirectly by invasion, * * * or (unless fire ensues and in that event for the damage by fire alone) by explosion of any kind." Also "if a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building, or its contents, shall immediately cease."

Deponent is informed and believes and expects to be able to prove upon the trial of this cause, that immediately preceding the fire above mentioned, by which the building insured was alleged to have been destroyed in the statement of claim; the explosive above mentioned by some means was ignited and a violent explosion ensued wrecking the insured building, blowing the roof thereof off and causing the same to fall outside thereof, so that there was nothing left but a wreck to be consumed by fire that ensued; and deponent is advised that the company is not liable for the loss and damage thereby occasioned:

(1) Because all the damage was done practically by the explosion.

(2) Because the insurance immediately ceased upon the fall of the roof and the side of the building which preceded the fire.

Third. It is also provided that said policy shall be void "If any

change other than the death of an insured take place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or
21 judgment, or by voluntary act of the insured or otherwise."

Deponent has been informed that before the fire the plaintiff sold or exchanged the insured property and conveyed the same either by a written agreement or by a deed, but *he* has been unable to verify this statement for the reason that no conveyance has been place of record.

DONALD M. McPHERSON.

Sworn to and subscribed this 16th day of September, A. D., 1905.
[SEAL.] AGNES WAY,
Notary Public.

My Commission expires January 16, 1909.

Plea.

And now, to-wit, September 27th, 1905, the above named defendant, by Jennings & Jennings, *her* attorneys, appears and pleads non-assumpsit.

JENNINGS & JENNINGS,
Attorneys for Defendant.

22 *Defendant's Testimony.*

Depositions of witnesses ex-parte defendant, taken by consent of counsel for plaintiff and defendant, to be read in evidence upon the trial of the cause in the United States Circuit Court, with the same effect as though taken upon a rule, the testimony to be subject to proper objections for competency and relevancy.

A. K. Truitt, Esq., and B. M. Clark, Esq., appeared for the plaintiff; W. K. Jennings, Esq., of Jennings & Jennings, appeared for the defendant.

The following witnesses were produced, sworn and examined before J. A. Whiteman, Notary Public, being the commissioner agreed upon by the respective parties, and the signatures of the witnesses to the testimony, when transcribed, to be waived. It is also agreed that the testimony shall be taken in shorthand by Emma C. Whiteman, and transcribed and certified.

Testimony of L. N. Keck.

L. N. KECK called and sworn.

Direct examination by Mr. JENNINGS:

Q. Where did you live in December, 1904?

A. Punxsutawney.

Q. Did you reside near the property of Mrs. Penman, the plaintiff in this case?

A. What Penman is it?
Q. Mrs. Annie E. Penman.
A. Yes, sir.
Q. Did you know her property that was burned on or about the seventh of December, 1904?
A. I know of her property being burned up then.
Q. What sort of a house was it?
A. Well, it was a kind of a frame structure.
23 Q. Did it rest on a stone foundation or on pins?
A. Well, I believe it rested on pins—part of it.
Q. Do you know how it was occupied?
A. Why, it was occupied by families—renters.
Q. By tenants?
A. Yes, sir.
Q. Do you remember what time of day the fire took place?
A. Well, I think it was between eight and nine o'clock somewhere in the evening. I am not positive.
Q. Where were you at the time that the fire broke out?
A. I was home.
Q. How near was your residence to this place?
A. I don't know exactly; three or four hundred yards, maybe more.
Q. You were spending the evening with your family, were you?
A. Yes, sir.
Q. What first attracted your attention?
A. Well, I don't know as anything attracted my attention particularly.
Q. Was it anything you saw or heard?
A. Well, I heard an explosion, but it didn't bother me any. It didn't attract my attention any at that time.
Q. You heard an explosion?
—. Yes, sir.
Q. Was it a loud explosion?
A. Yes, sir; pretty loud.
Q. You went out to see what it was?
A. No, I didn't go out then.
Q. How soon did you go after the explosion?
A. Well, I heard another one.
Q. You heard two?
A. Yes, sir.
Q. How close were they together?
A. Well, now, I couldn't positively say; maybe a minute or two apart, maybe longer possibly. I don't know exactly.
Q. Then you went out, did you?
A. Well, no, I didn't go out right away then. I think my daughter went to the window, or my wife heard somebody holler, and then they seen the house all on fire. Then I went out.
24 Q. After you went out what did you do?
A. I went over to the fire.
Q. What did you find when you got there?
A. I found the building afire and people burnt.
Q. How many people were injured?

A. I couldn't exactly tell you that. I don't know.

Q. Two or three or four?

A. Well, two or three, I guess. One I know of positively, I helped take care of.

Q. You helped take care of that one?

A. Yes.

Q. Where the people seriously injured?

A. This man was. I think he died before morning.

Q. You helped take care of him?

A. For a little spell, yes. Until the physician came.

Q. Was the house all on fire when you first saw it?

A. Yes, sir. That is one end of it.

Q. What end was that?

A. That would be the south end. The building, I believe, ran north and south. Not just exactly the south end either, but the next part. It was run off in rooms for families, and it was the next part that was afire when I saw it. There was fire coming out the windows on the same end too.

Q. Was the whole house destroyed?

A. I believe it was all destroyed.

Q. Did you know what occasioned the explosion?

A. No, sir, I did not.

Q. Did you know who occupied the house?

A. I didn't know any of them. They were foreigners as far as I know.

Q. How long did it take after you got there until the house was entirely consumed?

A. Oh, well, I couldn't say that. Some of it there burned until the next morning; some of the posts or ground work.

Q. You say you helped to rescue some of the inmates?

A. No, he came down to another party that lived below there, and I helped take him in the house and take care of him until the doctor got there. We laid him on the floor and handled him carefully.

Q. Did they call in a physician?

A. Yes, sir.

Cross-examination by Mr. CLARK:

X Q. Mr. Keck, you don't know where this noise came from that you heard?

A. No, I couldn't say that. It was over in that direction but I couldn't swear it was in that house.

X Q. You have heard similar noises before that and since that up there, haven't you?

A. Yes, I never paid any attention to it.

X Q. This particular locality is inhabited by miners that work at Elk Run Shaft?

A. Quite a few, yes. Mostly all of them, I guess.

X Q. Elk Run Shaft is just below this property?

A. Yes, sir.

X Q. You said the whole house was destroyed. You mean destroyed by fire?

A. Yes, it burnt up the whole business.

Re-direct examination by Mr. JENNINGS:

Q. You say the whole house was destroyed. How much of the house was standing when you first saw it?

A. Well, now, I couldn't exactly tell you that. There was quite a little bit of it. The fire started in this end and then consumed it on back. I couldn't tell you how many departments were standing yet. It stood long enough for the people to get goods out anyhow.

Q. Was the roof on the house when you saw it?

A. Most of it.

Q. What part was not on?

A. I couldn't tell you. It might have been on all of it. It was all ablaze and I couldn't see. I didn't look particularly.

Q. You didn't notice?

A. I didn't notice that.

Q. How long was it between the time when you first heard the first explosion and when you got there to the fire?

26 A. I don't suppose it was much more than a minute or two minutes anyhow. I live pretty close. Maybe it was a little longer, but a person goes pretty quick generally to those things, and I was pretty handy.

Q. I suppose you ran, did you?

A. I got there somehow. I don't know how.

Q. Did you notice whether any of the walls were down or whether the roof was off when you got there?

A. I don't think they were when I got there.

Testimony of Mr. Graffius.

THADDEUS GRAFFIUS called and affirmed.

Direct examination by Mr. JENNINGS:

Q. Mr. Graffius where did you live in December, 1904?

A. I lived in Punxsutawney here, in Elk Run addition.

Q. What was your business?

Q. I am a painter by trade.

Q. How old are you?

A. Fifty-one.

Q. Do you remember the fire which destroyed Mrs. Penman's house on December 7, 1904?

A. Yes, sir.

Q. Where were you when your attention was first attracted to the building?

A. My wife and I were just coming up from the Elk Run store, and just as we were in front of our gate I heard the explosion and looked up and saw it.

Q. Your wife was with you?

A. Yes, sir.

Q. You were just near your gate?

A. Yes, sir.

Q. And you heard the explosion and looked up, and what did you see?

A. I saw the flames immediately after the explosion.

Q. Before you saw the flames, what effect, if any, did you see from the explosion?

27 A. The only thing that attracted my attention, was the explosion, and the next thing was the flames.

Q. Did you see anything about the roof?

A. The flames were right at the roof. I couldn't see further than this end.

Q. Did you notice whether the roof was blown off?

A. I couldn't tell that.

Q. Or the side of the building blown out?

A. No, it was all afire. I couldn't tell whether it was blown out or not.

Q. The moment you heard the explosion you saw the fire, you say?

A. Yes, sir.

Q. How near were you to the building?

A. I think from where I was at that time probably might be 400 yards; maybe a little more than that.

Q. Did you go over to the building then?

A. I ran up then immediately. There was screaming and I ran up as quick as I could go.

Q. Did you notice the condition of the roof?

A. I didn't pay any attention to the roof, but only to that man that was burnt nearly to death. I took him right away.

Q. Did you have any talk with any person there right away?

A. No, sir, I did not. I took care of that man, took him right down to the house and took care of him for awhile.

Q. Who was the man that you helped care for?

A. I don't know his name. He was a foreigner and was badly burnt. He hadn't a thread of clothes on him and I took off my overcoat and wrapped around him and took him down there.

Q. Did you have any conversation with any of the inmates at that time?

A. Only the man I took him in the house to.

By Mr. TRUITT: We object to this as incompetent testimony—what the man told him at that time.

28 Q. Do you remember Mr. Young that talked with you and subpœnaed you the other day?

A. I know him.

Q. You had a conversation with him about this fire, didn't you?

A. Yes, sir.

Q. Did-'t you tell him that you saw the roof and side of the building blown out?

A. No, sir, I did not. I told him it was all on fire.

Q. Didn't you also tell him that one of the inmates told you they were dividing a can of powder when it suddenly exploded?

A. No, sir, I did not. I didn't have no conversation like that with him.

Q. Did you have any conversation with Mrs. Penman or any of her friends since you talked with Mr. Young?

A. No I did not have.

Q. You haven't talked with them since that time?

A. No, sir.

Q. Do you know what caused the explosion?

A. No, I do not. I don't know that.

Q. Did you know?

A. No, sir, I did not.

Q. Are you sure there was an explosion?

A. I don't know. It sounded a good deal like an explosion. I have heard explosions and that sounded like one.

Q. And it preceded the fire?

A. Yes, very quick.

Q. Is your wife here?

A. No, sir. She would tell you just the same as I would, and I told her if she had to come I would send for her.

Q. How long did you stay there at the fire?

A. I stayed there till we got word to the doctor to come to that man, and then I went home. It was pretty well burnt down then.

Q. How long was that?

A. Probably an hour.

Q. What portion of the building was standing when you first got there?

A. It was all standing but this one end there.

Q. Which end?

A. This south end next to town here.

29 Q. What condition was that in?

A. Well, you know the explosion was all in that end, according to my judgment. It was right at this end and the fire swept right on through the building.

Q. What was the condition of the side wall of the roof at that end?

A. I didn't pay much attention to that. I seen it was all on fire.

Q. I know, but you said just now that it was all standing except one end. Was any portion of that end fallen down?

A. It was burning. That's what I mean.

Q. It had fallen down?

By Mr. CLARK: We object to this as leading. He has directly testified to the contrary.

A. The fire was there. I didn't pay much attention to the fire, only to that man. My attention was directed altogether to that man.

Q. Was the man in the house or outside when you first saw him?

A. He was outside, just where I came up.

Q. He wasn't the only man that was injured?

A. No, but he was the first one I came to.

Q. Was any other person with you?

A. Not at that time. After I got down a piece I got some help

Q. Were you told anything by any of the inmates of that house?
A. No, sir, I had no conversation with any of them.
Q. Did you ever see any powder in that house?
A. I never was in it, I don't think.
Q. Did you ever see any going in?
A. No, sir.
Q. Do you know what an explosion of powder sounds like?
A. Yes, I have heard it.
Q. What kind of an explosion was this?
A. This was a dull thud, a very dull explosion.
Q. Did you look at it the moment you heard the explosion?
A. I looked right up.
Q. What did you see?
A. What I saw was a burst of flame immediately. As
30 quick as I looked the flames followed right immediately.
Q. Where did the burst of flame come from?
A. This south end of the building.
Q. Did the flame come out through the roof or the windows or how?
A. It was away high up. It might be the windows or the roof.
Q. Was it a large burst of flame or a small one?
A. Pretty large.
Q. Could a large burst of flame have gotten out of there if the roof stayed on?

Objected to by Mr. Clark as incompetent and irrelevant.

Cross-examination by Mr. TRUITT:

X Q. Mr. Graffius, about what was the size of that building?
A. I couldn't tell you, Mr. Truitt, I don't know.
X Q. It was composed or divided up into several tenements, wasn't it?
A. I think so, yes.
X Q. Quite a long building?
A. Yes, a long row.
X Q. You say this noise or this explosion, whatever it was, was in the south end?
A. It seemed to be.
X Q. Do you mean the extreme southern tenement—the extreme south tenement of the building, or the one next to it, or which one would you say?
A. Well, if I would say I think it would be the first.
X Q. The first on the south end of the building?
A. Yes, sir.
X Q. Did you know any of those people that lived in there?
A. No, sir.
X Q. They were foreigners?
A. They were foreigners.
X Q. You never talked with them?
A. No.
X Q. Before or after?
A. No.

X Q. This man that you took care of, you say was badly burned?
A. Yes, sir.
X Q. Did he have his clothes on?
A. Nothing but his shoes.
31 X Q. Could you tell, Mr. Graffins, what had burned the man?
A. No, I didn't know what burnt him.
X Q. Did you smell anything about him that would indicate what had burned him?
A. No, sir.
X Q. You couldn't tell from what you saw or his appearance?
A. No, I couldn't tell a thing about that.
X Q. Coming to the moment that you saw the flames, where did you see them first about that building; the very first sight of them you got?
A. The first I saw was at this end of the building, I thought. At this end from where I stood.
X Q. In the roof, windows, upstairs, or where now did you see it?
A. It seemed to be upstairs, up at the roof right at the time.
X Q. Up at the roof?
A. Yes.
X Q. Now, Mr. Graffius, when you got there that whole building was standing yet, wasn't it?
A. Pretty near all standing yet.
X Q. And burning?
A. And burning.
X Q. And you saw several of those tenants move out their goods, didn't you?
A. No, sir; I didn't see a thing but just that fire and that man.
X Q. You know they had time to move out their goods after the fire took place, don't you?
A. Yes, I suppose they had. I don't know about that.
X Q. Now, Mr. Graffius, did you see any part of the roof of that building—you didn't see any part of that roof blow off that building?
A. No, sir.
X Q. You didn't see any side of the building blow out?
A. No, sir.
X Q Did you see any part of that building blown apart or blow down before that fire?
A. No, I saw the flames and fire. That is all I saw.

Redirect examination by Mr. JENNINGS:

Q. Mr. Graffius, were you back there the next morning?
Q. No, sir.
32 Q. Have you been there since?
A. No, sir.
Q. Weren't you there at all?
A. Yes, I was up there.
Q. Did you see any of the roof timbers off in the fields around there at any time?
A. Oh, no.

Q. Don't you know that they were scattered all around there?

A. No. They might have been, but I didn't see them. I didn't pay much attention to anything, I told you before. I was taking care of that man.

Q. You are paying less attention now than you were once before, aren't you? Than you were when Mr. Young talked to you, aren't you?

A. I don't understand you.

Q. Didn't you tell Mr. Young that you heard a loud explosion and saw the roof and side of the building blown out?

A. No, sir, I did not; nohow. I never did.

Q. Didn't you also tell him that one of the inmates told you that they were dividing a can of powder?

A. I wish I had him here; I'd make him swallow it. I never told him that.

Q. Didn't you also say there was no doubt in your mind as to the cause of the fire?

A. I don't think I did. I had my mind made up what it was, but he didn't ask me that.

Q. What was it?

Objected to by Mr. Clark as incompetent. He already says he doesn't know. Anybody could guess. Objected to as being an opinion.

A. I believe it was an explosion.

Q. What caused the explosion?

A. Well I don't know. It might have been powder, or it might have been oil. I don't know what it was. I believe it was an explosion, though, that set it afire.

33 *Testimony of Isaac Cochran.*

ISAAC COCHRAN called and sworn.

Direct examination by Mr. JENNINGS.

Q. Mr. Cochran, where did you reside in December, 1904?

A. I live between Punxsutawney Borough and Elk Run Division.

Q. What is your age?

A. I am fifty-two.

Q. What was your business, Mr. Cochran?

A. I was working in the mine at the Elk Run shaft.

Q. Did you see the fire that evening of December?

A. I did.

Q. What was the first thing you saw?

A. The first thing I saw was the fire.

Q. Did you hear the explosion?

A. Now I heard an explosion, but I couldn't swear where it was or how it was. I was going up the street. It was not a heavy explosion, and this man Amundson was with me, and he drew my attention to it, believing it might have been his own place.

Q. Was his place near to it?

A. His place is probably a couple of hundred yards from it.

Q. After you heard the explosion what was the first thing you saw?

A. Well, now, the first thing I saw—I had to walk quite a few steps, probably the length of a lot, before I could see to where I saw the fire. When I first discovered it I could see it through the light in the windows in the far end of the house.

Q. Did you see the roof?

A. I saw the roof.

Q. Did you see the roof blown off?

A. I didn't see no roof blown off; all I saw was burnt off.

Q. How much was burned off when you saw it?

A. Well, to the best of my knowledge, there was none of the roof on fire when I got there.

Q. How long was it after you heard the explosion till you
34 got there?

A. Well, I walked pretty fast, and I had up hill to go.

Q. Didn't you run?

A. No, I didn't run as I mind of.

Q. Well, was it a minute or two minutes?

A. I wouldn't hardly think it would take more than three minutes to go from where I was around and climb a very steep piece of hill.

Q. How far was it?

A. It would be—you see to go straight on the street where I was going it would be probably 200 feet, then I had to go up about 150 feet, the length of a lot, and go out that.

Q. That would be three hundred and fifty feet; and you say it would take you three minutes to walk that?

A. Well, a man won't go up a hill like that very quick.

Q. Do you remember talking to Mr. Young?

A. I talked to Mr. Young; he called me out from my work the other day.

Q. No, I mean some time ago, shortly after the fire?

A. On Friday he talked to me, yes.

Q. Do you remember having a talk with Mr. Young in April or May last?

A. No, sir; I had never met Mr. Young to know him or talk to him until Friday of last week.

Q. Are you sure of that?

A. I am.

Q. Is your name Isaac Cochran?

A. Yes, sir.

Q. Didn't you tell Mr. Young that you saw the roof of the house blown off when the explosion occurred?

A. I am positive I never did, sir.

Q. Did you do anything towards the rescue of the inmates?

A. I did. I tried to get the fire off of some one. I tried to get the fire off of especially the woman of the house.

Q. Were they still in the house when you got there?

A. No, sir. When I got there they were coming out afire. There

was a man—two men, I believe, out, and the woman was coming out, and I tried to get the fire off of them.

35 Q. Were the woman's clothes on fire?

A. Her clothes were on fire.

Q. Did you know who they were?

A. I didn't know them or don't yet. I don't know their names.

Q. Do you know how many people were injured so that they died?

A. I believe there was four injured.

Q. Did all four die?

A. I can't positively say they did, but to the best of my knowledge they did.

Q. Did you see any timbers, roof timbers or side walls of the house on the ground anywhere?

A. No, sir, I did not.

Q. When you first saw the fire, what was the condition of the building?

A. Well, now, when I got there there appeared to be fire burning in the south end of the building. To the best of my knowledge there was no place had broken out yet when I got there. It was all burning in the inside.

Q. It had not broken out?

A. No, it was inside of the building.

Q. You didn't see any burst of flame then?

A. I did not.

Q. What portion of the building was this woman in? Where did she come out?

A. She came out of the south end of the house on the upper corner, at the back door was where she came from. I suppose from the kitchen end.

Q. The south end was the one first burned, I understand you.

A. That's what I said, yes, sir.

Q. Did you see any of the furniture moved from any portion of the building?

A. I saw them take some furniture out of the other side of the building, that is, the other end of the building, and I saw some furniture taken out of the next door to this end that was burning. I couldn't say just what it was.

Q. Was the next door part of this same tenement?

A. Yes, sir. That is, of the next family, you understand, that lived in it.

Q. Which portion of the building were these people in

36 who were injured?

A. In the south end of the building.

Q. Do you know the name of the man who occupied that?

A. I do not.

Q. Did you know what occasioned the explosion?

A. No, I did not.

Q. Do you know now?

A. What started the explosion?

Q. Yes.

A. No, sir, I could not say positively what done it.

Cross-examination by Mr. CLARK:

X Q. When you saw the fire first, Mr. Cochran, the building, you say, was all standing?

A. It was all standing when I first discovered the fire. The fire was all inside the building.

X Q. There was no roof blown off? No sides blown out? No windows blown out, or anything?

A. No, sir, not that I saw.

X Q. This woman that came out of the building—where did you see her come out? Through the door?

A. She came out the back door.

X Q. Was she on fire at that time?

A. Yes, sir. That's the lady I spoke of trying to get the fire off of.

X Q. When you were trying to get that fire off of her, did you smell any oil about her?

A. To the best of my knowledge I didn't particularly smell any oil, but she appeared to be saturated with oil, for when I pulled the fire off one place it would burn up again, like as if she was saturated with oil. That's one thing I told that gentleman who was questioning me the other day.

37 *Testimony of Mrs. Isaac Cochran.*

Mrs. ISAAC COCHRAN called and sworn.

Direct examination by Mr. JENNINGS:

Q. Are you the wife of the gentleman who has just testified?

A. Yes, sir.

Q. Where do you live, Mrs. Cochran?

A. In Elk Run.

Q. How close to Mrs. Penman's house where the fire was?

A. I suppose about a couple of hundred feet or yards, something like that. I couldn't tell.

Q. Was it on the same side of the street?

A. No, sir. We live on the lower side and her property was on the upper side.

Q. She was on the opposite side of the street from you?

A. Yes sir.

Q. Do you remember that fire that night?

A. Yes, sir.

Q. What first attracted your attention?

A. My husband came in the house—I had company—and he told me to get him a coat quick, that there was a big house on the hill on fire.

Q. You didn't know it until that time?

A. No, sir. I had company, there is so much noise from that shaft all the time that it takes something terrible in the house for you to notice it.

Q. The shaft makes a great noise, does it?

A. Yes, sir.

Q. What is it about the shaft that makes a noise? Is it the machinery or blower or what?

A. I don't know anything about machinery, but it is a big noise all the time.

Q. You were in the house at the time, were you?

A. Yes, sir.

Q. Have you any children?

A. Yes, sir.

38 Q. Are they young children?

A. No, sir. My youngest is fourteen years old.

Q. Did you see the fire yourself?

A. Yes, sir. I ran out as soon as Mr. came in.

Q. What was the condition of the building at that time?

A. I saw it through the windows. It appeared as though it was bursting out through the windows.

Q. Did you notice whether the fire was coming out the roof or not?

A. No, sir. I didn't see none when I first ran out. I was out quite a bit before I saw it coming out the roof.

Q. This was after your husband came up there?

A. Yes sir.

Q. Did you see any of the injured people?

A. No, sir. I did not go to where they were at all. I was too nervous.

Q. You don't know of your own knowledge whether there was an explosion or not?

A. No, sir. I couldn't tell you.

Q. Do you know whether any of the inmates that were injured died or not?

A. I think the lady and three men died, from what I heard people saying, that came from the hospital.

Q. Do you know whether they were all from one house or not?

A. I couldn't tell you that. I don't know anything about it. They were foreigners and I didn't know their names or never talked to them.

Q. Do you know what their occupation was?

A. I couldn tell you that. I don't know.

Q. How long did the fire last?

A. I think it was about half past seven when Mr. came running in, and I think at nine o'clock we were back in the house. It fell down to the ground by that time.

Q. Did you go up there?

A. No, sir. I didn't go to the hill at all. I stayed on the sidewalk.

Q. Did you stay opposite your own house, or go up to-

39 wards the fire?

A. I was down along the sidewalk where I could get a good view.

Q. How close were you?

A. I told you a bit ago how close it was.

Q. You stayed on the sidewalk in front of your own house?

A. I walked down a little ways. I felt the heat in my face, and they brought the water up from the house.

Q. Did they have a fire engine?

A. It was too bad when I got there. I think it was coming up but they went back. I think I heard the children say they was coming back.

Cross-examination by Mr. CLARK:

X Q. When you saw the house it was standing?

A. Yes, sir.

X Q. It wasn't blown down, or any part of it blown down?

A. No, sir. There didn't anything blow down about it.

X Q. You say about the time you saw it the flames were commencing to burst out the windows?

A. Yes, sir.

X Q. Which part of the building? The south end?

A. The south end, yes, sir.

X Q. You had heard nothing at all prior to the time your husband came in?

A. No, sir. I had company, and the children were playing, and I didn't notice a thing. There was so much noise from that shaft that it takes something pretty loud that you notice it in the house.

Re-direct by Mr. JENNINGS:

Q. Do you remember of Mr. Young talking to you along in the spring? In April?

A. No, sir. I never saw Mr. Young. I was out the day he was at my house and he talked to my daughter.

Q. He talked to your daughter?

A. Yes, sir. I never saw Mr. Young.

Q. Is your daughter married?

A. No, sir, she is not.

Q. Does she live in your house?

A. Yes, sir.

Q. What is her first name?

A. Maud.

I, Emma C. Whiteman, do hereby certify that I took full and accurate stenographic notes of the depositions of witnesses produced on part of the defendant in the above stated case, said depositions being taken at Punxsutawney, Pa., on the 16th day of October, A. D., 1905, before J. A. Whiteman, Esq., Notary Public, and that the foregoing pages contain a true and correct transcript of my said stenographic notes.

EMMA C. WHITEMAN,
Stenographer.

PUNXSUTAWNEY, PA., *Oct. 23rd*, 1905.

I hereby certify that the foregoing depositions, of witnesses ex parte defendant, were taken before me as commissioner by consent of counsel for plaintiff and defendant, at my office in Punxsutawney,

Pa., on the 16th day of October, 1905, by Emma C. Whiteman, stenographer. That the witnesses were duly sworn and all objections noted. I attach hereto also certificate of Emma C. Whiteman certifying that the foregoing depositions contain a true and correct transcript of her stenographic notes.

Witness my hand and notarial seal this 23rd day of October, 1905.

J. A. WHITEMAN. [SEAL.]

My commission expires Feb. 27th, 1909.

Witness fees paid by defendant through me, four dollars ($4.00).

J. A. WHITEMAN.

41 Before Hon. Joseph Buffington and a Jury.

And now, Thursday, December 7, 1905, this case came on for trial before the Hon. Joseph Buffington, Judge, and a jury.

Appearances: A. J. Truitt, Esq., and B. M. Clark, Esq., for plaintiff, and Messrs. W. K. and D. C. Jennings, for defendant.

Jury sworn at 12.10 P. M.

Case opened by Mr. Clark, for plaintiff.

Counsel for plaintiff offer in evidence fire insurance policy issued by the St. Paul Fire & Marine Insurance Company, the defendant in favor of Mrs. Annie E. Penman, the plaintiff, dated February 4, 1905, and the same is marked as Exhibit No. 1 of this date and received, without objection.

It is admitted that the defendant company received due notice of the fire and proofs of loss in due time.

Testimony of Mrs. Annie E. Penman.

Mrs. ANNIE E. PENMAN, sworn, being called in her own behalf:

Direct examination by Mr. TRUITT:

Q. You are the plaintiff in this case?
A. Yes, sir.
Q. To whom did this property that was insured in policy belong?
A. To me.
Q. Where was it situated?
A. In Punxsutawney.
Q. This state?
A. Yes, sir.
Q. What was that property worth?

By the COURT: You mean the house?

By Mr. TRUITT:

Q. Yes. The house that was burned.
A. $2,975.
42 Q. Do you know whether it was burned down or not?
A. Yes; it was burned down.
Q. What was burned?

A. The house.
Q. Your house?
A. Yes, sir.
Q. That was insured under this policy?
A. Yes, sir.
Q. Do you know when that was burned?
A. Yes, sir.
Q. At what date?
A. On the 7th day of December, 1904.

Cross examination by Mr. W. K. JENNINGS:

Q. When did you buy that property?

By Mr. TRUITT: The building?
By Mr. JENNINGS: No; I mean the lot on which the house was built.

A. It was a couple of years before we built on it.

Question objected to by counsel for plaintiff; it is a question of whether or not she owned it at the time of the fire.

A. Mr. Penman knows when we bought it. I don't just mind the date.
Q. Well, can you remember about how long it was before the fire took place that you bought the property?
A. About a year.

Counsel for plaintiff ask the purpose of this.
By Mr. JENNINGS: To find out whether she owned the property. She has testified that she owned it.
By Mr. TRUITT: There is no question in the pleadings as to the ownership of the property.
By the COURT: She has testified that she owned the property. I think this is proper cross-examination.

By Mr. JENNINGS:

Q. I don't mean to a day; but about how long before the fire did you buy the property?
A. It must have been about a year before.
Q. About a year?
A. Yes; it was a year.
Q. Did you build the house, or was the house on the lot when you bought it?
A. No, sir; I bought it.
43 Q. From whom did you buy it?
A. From Mr. Wester—the lumber.
Q. No; I mean the lot?
A. From Mr. Scott McKeown.
Q. Was it on the 30th day of January, 1904, that you bought that from L. S. & H. C. McKeown?
A. Well, it was along there some time—about January.
Q. Hadn't you sold that property before the fire took place?
A. No, sir.

Q. Had you any bargain or arrangement for a sale?
A. Why, yes; we were talking about selling it.
Q. Well, hadn't you made a contract for a sale?
A. Well, no; we hadn't just made a contract for sale.
Q. To whom were you going to sell it?
A. To Mr. Clark, Mr. Calloway and Mr. Jones.
Q. This Mr. Clarke here?
A. Yes, sir.
Q. How long before the fire was it that that arrangement was talked about?
A. About two months.
Q. Were there any papers written in regard to it at all?

By Mr. TRUITT: Isn't this a part of their case in chief? They have set up in their pleadings the statement that this woman had traded the property before the fire. They set that up as a defense; and why isn't this a part of their case in chief to show that, and not go into it in cross-examination?

By the COURT: Well, I don't know. She was put on the stand to show that she owned this property when it was burned, and it is certainly cross-examination to show that she didn't own it, if they can show it by her. Of course she can't testify as to the contents of any papers; that is part of their defense. But they can ask her the fact, as to whether there were any papers.

By Mr. JENNINGS:

Q. Was there any written agreement?
A. No, sir; there was no written agreement.
44 Q. There was no written agreement?
A. No, sir.
Q. Was there any money paid?
A. Not a penny.
Q. Was there any other property conveyed?
A. No, sir.
Q. Wasn't there a piece of property in Young township, near Walston, exchanged for this property?
A. No, sir.
Q. Or agreed to be exchanged?
A. No, sir; or wasn't. I was about buying that property.
Q. Did you own any other property there?
A. No, sir, I didn't.

It is also admitted that the premium on this policy was paid and the policy delivered.

Testimony of Louis Wester.

LOUIS WESTER, a witness called on behalf of plaintiff, sworn.

Direct examination by Mr. TRUITT:

Q. Where do you reside?
A. At Anita.

Q. In what County?
A. In Jefferson County.
Q. Were you acquainted with this property of Mrs. Penman's that was burned down?
A. Yes, sir.
Q. How did you become acquainted with it?
A. Because I furnished the lumber and built it.
Q. You are a contractor, are you?
A. Yes, sir.
Q. Do you know whether that building was burned down or not?
A. Yes, it was burned down.
Q. At the date of the fire what was that building worth?
A. At the date of the fire that building was worth twenty-nine hundred and some odd dollars.
Q. Did you ever make any calculation as to its value?
A. I was making a calculation when I was contracting for it; but then Mr. Penman got so much extra to it, so I had to charge him for the lumber he got for that building.
Q. Well, you built it?
A. Yes, I built it.

No cross-examination.

Testimony of O. F. Reddick.

O. F. REDDICK, a witness called on behalf of plaintiff sworn and testified as follows:

Direct examination by Mr. TRUITT:

Q. On December 7th, 1904, where did you reside?
A. I resided in Punxsutawney.
Q. Jefferson County, this state?
A. Yes, sir.
Q. Do you know or did you know of the building in that borough belonging to Mrs. Annie E. Penman, covered by this insurance policy?
A. I did.
Q. How far did you reside from that building?
A. I suppose about 250 feet, likely; just the length of that lot.
Q. Is that building in existence today?
A. No, sir.
Q. What happened to it?
A. Well, it burned down.
Q. Do you know when?

By the COURT: There's no trouble about that, is there?

A. Along about the 7th or 8th of December, I never kept much account of it.

No cross examination.

Plaintiff rests.

46 *Defendant's Testimony.*

Mr. Jennings opened for defense.

Mrs. Hannah Amundson Testified.

Mrs. HANNAH AMUNDSON, called on behalf of defense, sworn, testified as follows:

Direct examination by Mr. JENNINGS:

Q. Where did you live on the 7th of December of last year?
A. In Punxsutawney borough.
Q. How near did you live to the house that belonged to Mrs. Penman, that was destroyed by fire?
A. Well, I don't know, about a hundred feet.
Q. Do you remember the fire that took place by which that building was destroyed?
A. Yes, sir.
Q. What time in the evening or day was it?
A. Half-past seven or something in the evening.
Q. I wish you would state whether you saw one of the inmates of that house going into the house a short time before the fire, and, if so, what you saw?
—. Yes, right opposite my house, about a quarter of an hour before I saw the fire, and he carried something, but I don't know for sure what it was, because it was dark.
Q. He was carrying something?
A. Yes, sir.
Q. How was he carrying it?
A. On his arm.
Q. What did it look like?
A. Well, I couldn't tell you, sir, what it looked like; it was dark, and I didn't pay no attention, and it looked like a can or something.
Q. It looked like a can or something?
A. Yes, sir.
Q. How long had you lived in that neighborhood?
A. Five years.
Q. Was your husband a miner?
A. He was a miner, but he isn't a miner now.
Q. But he was a miner?
A. Yes, sir.
47 Q. Then had you been in the habit of seeing mining powder kegs or cans?
A. Yes, sir.
Q. You knew what they looked like?
A. Yes; I did.
Q. I show you a cut or a picture which has just been marked as Exhibit 2, and ask you if you know what that is?
A. Well, I don't know. I wouldn't say for sure. He had something, but I wouldn't say what it was.

Q. That is not my question. What I asked you is, if you know what that picture represents?

A. Yes; I do.

Q. What you saw this man carrying on his arm——

A. Yes, I saw him carrying it on his arm.

Q. Well, now, what was it that he carried?

A. Well, that's a thing I don't know.

Q. What did it look like?

A. It looks like a big thing he had in his arm, but I didn't know what it was, because it was dark.

Q. It looked like a big thing he had on his arm?

A. Yes, sir.

Q. Well, did it look like this picture?

A. Well, I don't know. If I would see it for sure I would tell you.

Q. Well, I am not asking you to tell me.

A. Well, then I would have to say I don't know.

Counsel for plaintiff object that it is incompetent and irrelevant to ask the witness whether it looked like that picture.

By the COURT: Well, she has answered the question that she doesn't know.

By Mr. JENNINGS:

Q. Did you at any previous time say what it was that you thought he was carrying on his arm?

Objected to by counsel for plaintiff.

A. No, I didn't, because he passed my house a dozen times a day, so I didn't pay any attention.

Q. Did you tell any person within the last three or four
48 months what you thought you saw this man carrying on his arm?

A. No, sir; I always said I didn't know what it was.

Q. Well, did you say what you thought it was?

A. No. It looks like some big thing he had in his arm.

Q. Well, what kind of a great big thing?

A. Oh my, there are many big things.

Q. Well, did it look like a barrel of flour?

A. Well, no. But still, I don't know, because it was dark.

Q. Do you know that gentleman? (Indicating a gentleman at the counsel table.)

A. Yes, sir.

Q. Did you have any talk with him on the 16th of October last about what you saw this man carrying?

A. Yes.

Q. What did you tell him?

A. I said it looks like a keg of powder, but I didn't know for sure. That was what I said.

Q. And that was about fifteen minutes before the fire.

A. About fifteen minutes or half an hour.

Q. What was the first thing you saw after the fire broke out?

A. I saw the people in the fire.
Q. On the street?
A. On the hill; yes.
Q. Were some of them carried into your house?
A. One of them.
Q. Did that person get well—was it a man or a woman?
A. It was a man.
Q. Did he live or die?
A. He died.
Q. Did you look at the building that was on fire, or was your attention taken up in——
A. I looked at it once; that was all; I didn't look at it then; it was all burned down.

Cross-examination by Mr. CLARKE:

Q. You lived how close to this property, did you say?
A. Well, right then, I don't know, about a hundred feet or something like that. I am a very close house.
Q. You heard no explosion that night did you?
A. No, sir.
49 Q. And you were in your own house?
A. Yes, sir.
Q. When the fire started?
A. Yes, sir.
Q. Didn't you also tell Mr. McPherson—that is, this gentleman here—at the time you were talking to him, that that looked like a can of oil that that man was carrying?
A. What.
Q. Didn't you also, in talking to Mr. McPherson, on the 16th of October, that it looked like a can of oil, that he had come up from the grocery store?
A. Well, that's what they heard.

By Mr. JENNINGS Don't tell what you heard.

A. Well, that's what I thought

By Mr. CLARKE.

Q. Well, you didn't say that it looked like a can of oil, too?
A. No, sir, I never did.
Q. In the mining region it is very common for the people to use kegs or buckets or other conveniences for carrying articles around?
A. I don't know. I don't know a thing about it.

Counsel for defendant object to the foregoing question.

Q. Was a child burned up in that building?
A. Yes, sir.
Q. Didn't this man get burned in attempting to rescue that child; caught on fire by trying to get up stairs to get that child?
A. Well, I don't know. They were all on fire, but what he was doing I don't know. I didn't see him before he was hurt.

Counsel for defendant offer in evidence the following depositions.

taken ex parte defendant by agreement of counsel, to wit, the depositions of L. M. Keck, Thaddeus Graffius, Isaac Cochran and Mrs. Isaac Cochran, and said depositions were read to the jury.

Court here adjourned until Friday, December 8, 1905, at 9:30 A. M.

50 *Testimony of Frank Moronose.*

FRANK MORONOSE, a witness called on behalf of defense, sworn and examined by the aid of an interpreter, Mr. F. Canuti, who was also sworn.

Direct examination by Mr. JENNINGS:

Q. Where did you live on December the 7th, a year ago?
A. Elk Run Shaft.
Q. Did you know the house belonging to Mrs. Penman that was burned down on the evening of that day?
A. Yes, I lived in there when it was burned.
Q. Were you a boarder, or were you the lessee, or the tenant yourself?
A. I was a boarder.
Q. What was the name of the man that occupied the premises as the tenant?
A. Dominico Masuto.
Q. Were you there at the time the explosion took place?
A. Yes, sir.
Q. Where did you come from?
A. From the railroad track, where I had been working.
Q. State just what took place there while you were staying there. What were you doing at the time that explosion occurred?

Counsel for plaintiff object to the use of the word "explosion," there being no evidence so far that there was any explosion.

By the COURT: Well, ask him what took place.

By Mr. JENNINGS:

Q. What were you doing that evening at the time the fire began?
A. I was taking my felt boots off.
Q. Now tell us what took place at that time?
A. I was taking my felt boots off, and of course I don't know what powder, or how much powder was there.
Q. Was there any powder there, and what was it in?

A. There were three or four boxes of macaroni, and close to
51 these boxes were two or three cans of powder, or cans used for powder.

By Mr. TRUITT:

Q. Cans used for powder?

By the INTERPRETER:

Q. That is what he said.

By Mr. JENNINGS:

Q. What kind of powder?
A. It was the kind of powder that we use in the mines.
Q. Go on and tell us what took place. What did Masuto do, or other men there?
A. As I was taking the felt boots off, they were throwing caps or ubs up, to play with them, for fun.
Q. What were those? Describe those.
A. They were small tubes the size of a small stem, a smoking e, and the tip at one of the ends it was sulphur, and inside of e tubes they were putting out sulphur or powder.
Q. Were those squibs lighted, and if so, who lighted them?
A. The house boss was lighting them.
Q. What did he throw them up in the air for?
A. For fun.
Q. Now I ask if there was powder in one or more of those cans, re that squib or one of those squibs fell?
A. There was certainly powder in the kegs or cans, but I can't you how much powder was there.
Q. Well, was one or more of the kegs open?
A. They were all open. That man took the powder out from m.
Q. What did they take the powder out of them for, for what use?
A. To go to the mines.
Q. What did they do with the powder by way of preparation for mines, when they took it out of the kegs?
A. They would put it in lead cans, holding about two pounds owder.

Q. What was the size of those kegs, how much powder would each keg hold?

A. They were about so high, 16 or 17 inches high.

Q. How much would the powder weigh, if the keg had been full?
A. I do not know. I couldn't tell. I have never bought powder, ight make a mistake if I would say 40 pounds, and I might e a mistake if I would state fifteen pounds; and there might be nty-four or twenty-five pounds.
Q. Twenty-four or twenty-five pounds in each keg if full?
A. Well, I don't know. I said so much, but it might be less.
Q. Did you see the boss of the house, as you call him, at any vious time, filling tubes with powder there in that house?
A. Yes, sir.
Q. How often?
A. I saw him several times. I had been there five months.
Q. How many kegs did you see there at one time, with a man ach keg, filling these tubes, at any time during the time you e boarding there?
A. Each man had a keg for himself.
Q. Well, how many of them?
A. Three persons were working in the mine.
Q. And each one had a keg for himself?
A. Yes, sir.

The same sized keg as the one you have been talking about?
Well, one kind for all, for which they paid $1.50 to $1.75.
How long had you boarded there?
I went there in July, nearly six months, it was.
And during that length of time that you boarded there, had
en the boss of the house engaged in filling tubes from the cans,
der his direction, during these six months? During what
n of that six months did you see that practice of filling tubes
he cans going on? Was it a week, two weeks, or during the
of the six months?
I haven't counted it; I couldn't say; three or four or six
times.
Q. Well, were they running through the whole period of
six months?
They always worked in the mines; yes.
What time of the day or evening, usually, did this filling of
es take place?
Sometimes they would fill them in the morning and sometimes
evenings.
After they came from work?
Yes; after they came from work.
Were there lights in the rooms at other times or fires?
What kind of lights?
Were there candle light or lamp light or fire light?
Oil lamp light.
When these squibs were thrown up in the air, do you know
r one of the lighted squibs fell in a can of powder or not?
f none fell in the keg, how would the kegs light, take fire?
After the squib had been thrown up and had fallen down,
ook place—whether there was an explosion, and what followed?
sel for plaintiff object to the form of the question.
ction overruled.
Yes, there was an explosion.
Was it a loud explosion, or what kind of an explosion was it?
t was a very good explosion.
How many people were in the room at that time?
Six persons.
How many of those were injured?
All.
Did any of them die?
All died, except myself and another person.
Was that other person in the room or was he out of the room?
We were inside and this man was at the door, leaning on the
the door.
How were these people injured, by what?
The explosion.
Well, were they killed by the explosion, or was fire thrown
n, or how were they hurt by the explosion?
A. They were burnt and they died afterwards.
Q. How did they catch fire? After the explosion, what
took place—whether the fire was scattered or not?

A. When the house took fire, the people were burned by the fire.

Q. Were you yourself injured?

A. Yes.

Q. Did you take fire from some of the other people, or from the building, or as the immediate result of the explosion?

A. I was burned by the fire in the building. There was too much smoke and I could not get out in time.

Q. Were you much injured? Whereabouts, in your hands or how?

A. My hands, face and back.

Q. Was the fire scattered around, or how did these people take fire?

A. The powder exploded and our clothes took fire and the whole house was afire.

Q. How long were you in recovering from the effects of the fire?

A. I was about two months, or forty-seven or fifty days in the hospital; and then after getting out I was still disabled and had to go to other doctors.

Cross-Examination by Mr. Tracy.

Q. How long have you been in this country?

A. It was four years on the 7th of April.

Q. How long have you been mining coal and working in coal mines.

A. I worked in the shaft about two months.

Q. The men who work there go and buy powder?

A. Yes, sir.

Q. And they take it to where they live, after they buy it?

A. Yes, sir.

Q. And then take a little flask of the powder from where they live into the mine?

A. Yes, sir.

Q. This was mining or blasting powder, used to blast coal with?

A. Yes, that's what it was used for.

Q. You say there were how many persons hurt there?

A. There was a child, who was two years old, and who was burned right there and then.

Q. This child was upstairs asleep, was it?

A. He was down stairs, playing near the table.

55 Q. And didn't the father and mother go back in after the child, and wasn't that the way they happened to be so severely burned?

A. No, sir; no one returned.

Q. Didn't the father or mother or someone want to go back and get the child?

A. The father and mother did not move to get the child. The party who did move was the brother of the mother, I think.

Q. And he went back in after the child and got in the fire, and got burned, didn't he?

A. I don't know. I couldn't say whether he was burned or not.

Q. These injuries consisted of burns?

A. Yes; all burns.

By Mr. JENNINGS:

Q. Will you show your hands to the jury?

By Mr. TRUITT: This isn't a case of that nature.

By the COURT: Oh, well, the jury has seen his hands.

By Mr. JENNINGS: Counsel said a while ago we haven't proved an explosion.

By Mr. TRUITT: He might have had his hands injured by fire But we have no objections.

Witness exhibits his hands to the jury.

56 *Testimony of D. B. McPherson.*

D. B. McPHERSON, called on behalf of defense, sworn.

Direct examination by Mr. *McPherson:*

Q. You are a special agent of the defendant company, are you?

A. I am.

Q. I wish you would state whether you visited the premises of Mrs. Penman since the fire in Punxsutawney or the Elk Run addition to Punxsutawney?

A. I did; yes.

Q. How many times were you there?

A. I was there only once.

Q. When?

A. Day before yesterday.

Q. I wish you would state whether you saw any mining cans there, and if so, how many?

A. I saw in the ruins five powder cans. One of them, however, had cinders in it, and I take it for granted that that was a coal bucket.

Q. There were five cans, however?

A. Yes, sir.

Q. Were those cans in the ruins of this particular building?

A. They were.

Q. Did those cans have any stamp on them indicating what they had contained or how much?

A. No; there was no stamp on them that was visible. Those cans were rusted so that I couldn't read any stamp on them.

Q. Of what material were they?

A. They were all corrugated iron, I would call it.

Q. You know what cans of mining powder look like, don't you?

A. Yes, sir.

Q. I wish you would state what kind of cans those were?

A. These were corrugated iron cans; I should say they were ten inches high, and from six to eight inches in diameter, and they would hold about twenty-five pounds each.

Q. Did you see any cans in the neighborhood or the store of a similar kind?

A. I did.

57 Q. Did they have any figures stamped on them?

A. On the tops of the cans was stamped the name of the maker and 25 lbs.

Q. On the top of the can?

A. On the top of the can, yes.

Q. Did these cans that you saw have the tops on them?

A. They had not.

Q. Well, from what you saw there, are you prepared to state how much powder those cans would have contained when they were perfect?

A. I am prepared to say that I believe that they would hold 25 pounds.

Q. And you saw four that had nothing at all in them?

A. Yes, sir.

Q. And one that had apparently been used as a coal bucket or something of that kind?

A. Yes, it had cinders in it.

Q. I wish you would state whether you saw any of those cans in such condition as would indicate what had occurred to them, or whether they had been injured, or what?

Objected to by counsel for plaintiff, as incompetent, the witness not having qualified to testify as to this.

By the COURT: You may ask him what the condition of the can was.

By Mr. JENNINGS:

Q. Well, what was the condition of the can?

A. They were all but one intact, except for the absence of the top, and this one the side of it was all gone, the side as well as the top. I tried to pick that up, but I couldn't do it.

Q. Why couldn't you pick it up?

A. Simply because it fell to pieces.

Q. Wouldn't hold together?

A. No, sir.

Q. Where the side had been removed, was it removed with a clean cut?

A. No, sir it wasn't.

Q. How did it look?

58 A. It looked as though it had been broken off. It was all jagged and rough. There was nothing even or smooth about it, as if it had been cut.

Q. It was jagged and rough?

A. Yes, sir.

Q. Had it been oxidized, rusted?

A. Yes, sir; badly.

Q. From what you saw of that particular can, were you able to arrive at any conclusion as to what had put it in that condition?

Objected to by counsel for plaintiff, as incompetent.

By the COURT: The objection is sustained.

By Mr. JENNINGS: The question is whether he was able to arrive at a conclusion.

By the COURT: Well, what is the use of having him state that he could arrive at a conclusion, if we don't admit the conclusion.

Exception noted.

By Mr. JENNINGS: But the question had not been asked.

By the COURT: Well, you were going to lead to that, so I will just meet it. I will give you an exception.

Cross-examination by Mr. TRUITT:

Q. You say you were at the ruins this week?
A. Yes, sir.
Q. And you found there five empty powder cans or kegs?
A. Yes, sir.
Q. And one of them was damaged?
A. Yes, sir.
Q. And that was the only one?
A. I said they were all lacking the tops and that one of them, in addition to the top, the side was all gone.
Q. None of them had tops on?
A. No.
Q. The miners use these kegs for carrying water in, don't they?
A. I don't know.

Objected to, as not cross-examination.

Q. Well, they use them for other purposes, carrying coal in, too, don't they?
A. I do not know, sir.

59 By Mr. CLARKE:

Q. This fire took place on December the 7th, and you were not there until last week?
A. Until this week, day before yesterday.
Q. You don't know how long those kegs had been about those premises?
A. I do not.
Q. It is quite common to see powder kegs around mining houses, is it not?
A. I am not very well acquainted with mining houses.
Q. Don't you know as a fact that it is quite common to see them?
A. I do not, sir.
Q. These cans are lying out in the open now for almost a year, are they not?
A. I presume so.
Q. Nothing over them?
A. Nothing over them.
Q. And they have rusted?
A. Yes, sir.
Q. And you say there was only one can that showed any signs of injury, with the exception that the tops had been taken off of all of them?
A. That's what I said.
Q. Those tops were taken off clean, and the rim of the keg was perfectly even and clean and smooth?

A. I can't say that. I didn't examine that closely.
Q. The entire top was removed, was it not?
A. Apparently so.

By Mr. JENNINGS:

Q. Mrs. Amundson was asked yesterday whether she had not told you something that she had said in regard to what you saw that man carrying. What did she tell you?

Objected to by counsel for plaintiff, that there is no contradicting on that point; the witness having stated that she had made the statement to Mrs. McPherson that it looked like a can of powder, but she didn't know whether it was or not.

By Mr. JENNINGS: Well, it was after a good deal of hesitation, and I just wanted to prove what she actually said.

By the COURT: Well, is that evidence?

60 By Mr. JENNINGS: It would not be evidence if the witness had not been on the stand.

By the COURT: Well, can one of your witnesses come on and prove what another of your witnesses has told him at another time?

By Mr. JENNINGS: It is only under these circumstances that it would be admissible: Where a witness has stated certain facts to a party and then refuses to make the same statement on the witness stand, a person has a right to prove what has been stated. But I presume it is scarcely necessary to go into that. She virtualy admitted it.

By Mr. CLARKE:

Q. You employed a detective to go up into that country and make an examination of the premises and community, did you not?
A. I did not.
Q. Didn't you have a man by the name of Young who went up there frequently for the purpose of making examinations?
A. I had a man by the name of Young who went up on two occasions; one was to see some witnesses and another time was to subpœna them; that was all.
Q. You sent him there to investigate the cause of the fire, did you not?
A. You might call it that.
Q. That is the Mr. Young that is referred to in the depositions that were read here yesterday.
A. Yes, sir.

By Mr. JENNINGS:

Q. What is Mr. Young's business?
A. Mr. Young is a fire insurance adjuster, an independent adjuster.
Q. He went up there at your request to examine into this fire?
A. Yes, sir.
Q. He is not a detective, is he?
A. I don't think so.

By the COURT:

Q. Where were these cans with reference to each other?

A. The house laid from south to north generally, and as you go into it, it would be the southwest corner of the house, about twelve feet from the southwest corner of the building was the can to
61 which I referred to as having been broken, being in bad condition; and in what I would take as the same room, over towards the other corner, was the one which had the cinders in it, and the other three cans, as I recall it now---two of them were in the northernmost end of the house and one of them was somewhere between the ends I couldn't say just exactly.

Counsel for defendant here called the plaintiff, Mrs. Annie Penman, as for cross-examination. Upon being told by the court that no rule of that kind obtains in this court, but that they may call the witness generally, counsel declined to call her generally; and

Defendant rests.

Rebuttal.

Counsel for plaintiff asks the court to direct a verdict in favor of plaintiff.

By the COURT: Have you no further testimony?

Mr. TRUITT: Yes, we have further testimony.

By the COURT: Then we will hear that testimony.

62 *Testimony of A. W. Callaway.*

A. W. CALLAWAY, called for plaintiff in rebuttal, being duly sworn testifies as follows:

Direct examination by Mr. CLARKE:

Q. Where do you live?

A. At Dulaney, Pa.

Q. What other name has that town, that mining town?

A. Adrian Mines.

Q. What is your occupation?

A. Superintendent of mines.

Q. For what company?

A. Rochester and Pittsburgh Coal and Iron Company.

Q. Of what particular mine are you superintendent?

A. Elk Run Shaft, Adrian and Florence.

Q. Is that the Elk Run Shaft that has been mentioned here as being near the Penman property?

A. Yes, sir.

Q. How long have you been acting as mine superintendent?

A. About nine years.

Q. How many men have you under your control?

A. Twenty-three hundred.

Q. Do you live and reside in and about this mining town?

A. I do.

Q. How long have you resided there?

A. Twelve years.

Q. Is it not very common to see numerous powder kegs around miner's dwelling houses?

Objected to by counsel for defendant as incompetent and irrelevant.

Objection overruled.

A. It is a common thing. So common that I have to send wagons to haul them away frequently.

By Mr. TRUITT:

63 Q. What did they use empty powder kegs for about those premises?

A. They use them for water buckets, for wash basins, coal buckets, cinder-buckets,—anything that they need a bucket or pail for. I have seen them using them for pickling meats and pickling eggs, and things of that kind.

Q. What shape do they prepare them in for a vessel or a receptacle, with reference to the tops or the bottoms?

A. They cut the top off inside the rim and get a piece of old hoop iron or some thing and put a little handle on them.

Q. Don't they make any use of these kegs where they do not put handles on them?

A. I suppose they do in some cases, but they generally throw away what they don't use. Throw them out on the ash pile.

Q. Do they not make use of kegs for pickling meats and things of that kind, as you stated, putting potatoes in, and so on, without putting the handles or bails on them?

A. They do; yes.

Q. What is the name of the powder that miners use? What do you commonly call it?

A. Blasting powder.

Q. Is that or is it not in common everyday use by the miners?

A. It is.

Q. Where is the customary place for keeping that powder?

A. They usually buy a keg at a time and take it to their homes, or put it in the cellar; sometimes on the porch, sometimes in the rooms. The law doesn't permit them to take the keg full into the mines; so they have to take it in in small quantities from the keg.

Q. Is that custom of keeping it in that way a well known fact through the mining region?

A. It has been the custom ever since I have been around that region; and everywhere I have visited I have seen the same custom.

Q. What class of people occupied the dwelling that was burned?

A. A portion of them, I knew were miners.

Q. Was this character of structure such as would ordinarily be called a miner's dwelling?

A. It was.

64 Cross-examination by Mr. JENNINGS:

Q. You say you are familiar with the customs of miners?
A. Yes, sir.
Q. I presume you have been in their homes and you know how they do things?
A. I have been in their homes; yes.
Q. And they are prohibited by law from taking mining powder, except in small quantities into the mine?
A. I didn't catch that question.
Q. I say they are prohibited by law from taking the mining powder in large quantities into the mine?
A. Yes, sir.
Q. Are they required to have it in proper form, in tubes, or flasks, or something of that kind?
A. No particular form of carrying it is prescribed, but it is usual to have it in little flasks.
Q. They take it to their homes and fill the flask and take it from there to the mines?
A. Yes, sir.
Q. And they usually have it in their dwellings?
A. Some put it in the houses, some on the porches.
Q. Blasting powder and mining powder are the same thing under different names?
A. Well, it is used in blasting down the coal in mines.
Q. Well, it is an explosive, isn't it?
A. Well, it would come under the line of explosives, I presume.
Q. Well, what is technically known as an explosive?
A. I am not an expert on explosives.
Q. Well, you have been in the mining business for a good while?

Objected to by counsel for plaintiff as not cross examination.
Not pressed.

65 *Testimony of O. F. Reddick.*

O. F. REDDICK recalled in rebuttal.

Direct examination by Mr. TRUITT:

Q. Did you see this fire?
A. Yes, sir; I did.
Q. Was there anything preceded the fire, an explosion?
A. Nothing to my knowledge.
Q. Where were you when the fire took place?
A. I was in my home.
Q. How far from the fire is that?
A. I suppose in the neighborhood of 225 feet, likely, across the lot.
Q. Explain what is the first thing you saw?
A. Well, the first thing I saw was the light in the window after I had heard "fire" halloed.

Q. The first thing you saw was the light in the window?
A. Yes, sir.
Q. Which window, or what part of the building?
A. Well, it was in the south end of it, but rather west, the windows towards me.
Q. In the south end and in the west window?
A. Yes, sir.
Q. Was that the front of the building
A. That would be the front of the building; yes, sir.
Q. How was it when you first saw it as to the building being intact, the windows in and doors in and roof on—how was that?
A. Well, I think the doors were on, and the windows were in as far as I could see. It looked that way from my house, anyway. I could see the bright light.
Q. Did the house burn down?
A. Yes, sir.
Q. Where do you reside?
A. Now or at that time?
Q. Well, then, where did you reside, at the date of this fire?
A. I resided in Punxsutawney.
66 Q. How far from this building, from the Elk Run shaft there
A. I don't know; five or six hundred feet, I suppose.
Q. From the nature of the building, the character of it, what would you say as to its being for miners or tenants of that kind.

Objected to by counsel for the defendant, as incompetent and irrelevant.

By the COURT: He may state what kind of a building it was, if that is material.

By Mr. TRUITT: We will follow this by showing that the Insurance Company knew it was going to be used by miners and what they use.

By the COURT: If you show that then it is admissible.

By Mr. JENNINGS: The policy shows that this was an unfinished building and that there was permission to finish it, and that it was to be occupied by tenants. There couldn't have been any understanding about the tenants at the time. Therefore, it is irrelevant.

By the COURT: Well we will not go into this, and the objection is sustained.

By Mr. TRUITT:

Q. How long have you lived around mines?
A. Well about twenty-three years, I guess.
Q. Are you acquainted with their custom of getting powder and keeping it and using it?
A. Yes; quite a bit.
Q. Did you ever work in the mines?
A. No, sir.
Q. Have you ever been in the mines?
A. Yes, sir.
Q. What did you do there?

A. I will take that back. I have worked in the mines.
Q. What did you do in the mines?
A. Tended stock.
Q. Took care of the stock down in the mines?
A. Yes, sir.
Q. Are you familiar with the custom in the mining regions of the miners buying and keeping and using blasting powder?
A. Yes, sir.
Q. Where do they usually keep it?
67 A. Well I think it is most generally kept in their dwellings where they live, as a rule, as far as I can see.
Q. Do you know why?
A. I suppose that is the only place they have to keep it.
Q. Are they permitted to keep it in the mines?
A. No, they are not permitted to keep it in the mines in large quantities. At least they don't take it in *it* that way.
Q. What quantity do they take to the mines?
A. Oh, I suppose different quantities; I suppose three or four pounds, maybe; small quantities.
Q. For what they call a shift, or a day's work?
A. Yes sir.
Q. Were the parties that lived in this building miners?
A. I think they were.

No cross-examination.

Testimony of W. S. Brown.

W. S. BROWN, a witness called on behalf of plaintiff in rebuttal, being duly sworn testified as follows:

Direct examination by Mr. CLARKE:

Q. Where do you live?
A. At Punxsutawney.
Q. What is your business?
A. I am an insurance agent; in the insurance business.
Q. What is your firm's name?
A. Brown Brothers.
Q. Are you a member of the firm of Brown Brothers that placed the insurance on the Penman property?
A. Yes; I am a senior member of the firm.
Q. Who placed this insurance, with reference to you or your brother?
A. I placed it.
Q. At the time you placed the insurance, did you know the character of the building that you were insuring?
A. Yes, I did.
68 Q. What was the character of that building?

Counsel for defendant asks for an offer, as to what counsel means by that. If he merely means whether it was a frame building, there is no objection.

By Mr. CLARKE: We propose to prove by the witness on the stan that he is an agent of the St. Paul Fire and Marine Insurance Com pany, the defendant, and placed the policy on this building that wa destroyed; that he knew at the time he placed it that it was a miner dwelling house, to be occupied by miners; that he has had fiftee or twenty years' experience in placing insurance on properties o this class, and that he knows, and knew at the time he placed th risk, that it was the common and ordinary custom for all the miner to keep more or less blasting powder about their premises; that h had that knowledge at the time the risk was placed; and also tha the insurance company charged an increased rate on the buildin insured, solely on the ground that it was rated as a miners' dwellin house.

By the COURT: Let me understand. How does that affect the que tion of this policy? What is the provision in the policy?

By Mr. CLARKE: The provision in the policy is that dynamite an gunpowder, not to exceed twenty-five pounds——

By Mr. JENNINGS: And other explosives.

By Mr. CLARKE: And other explosives.

By the COURT: Can not be stored on the premises?

By Mr. JENNINGS: Kept, used or allowed.

By Mr. CLARKE: We contend that blasting powder does not fa within the prohibitive provision of that policy. And we further con tend, as a matter of law, that, even if it were, the fact that the in surance company knew of the condition of the premises at the tim the agent placed the insurance, and knew of the general custom o using the prohibitive article, the policy is perfectly valid as betwee the insured and the insurer.

69 By Mr. JENNINGS: We object to the proposed evidence, a incompetent and irrelevant; first, because the policy in su shows upon its face that the building was an unfinished one, an that there was a privilege to finish it, and that it was to be occupie by tenants; second, that there is an absolute prohibition in the polic itself against the keeping, using or allowing of certain explosive mentioned, and following with the general term, "and other e plosives."

After hearing the argument of counsel on this offer, the objection were overruled by the Court and an exception granted to defendant

By Mr. CLARKE:

Q. Had you any knowledge at the time you took this risk wh was to occupy the building?

A. Yes; I had knowledge that it was to be occupied by miners.

Q. How long have you been in the insurance business?

A. Twenty-three years last September.

Q. In what particular region of the State?

A. Through Clarion County and Jefferson County all the whil

Q. Have you covered or taken a large amount of risks as agen for different companies on miners' dwelling houses?

A. Yes; I have had considerable experience for coal companies i our district during that time.

Q. And in inspecting the risks and adjusting losses to properties of that kind, have you frequently visited mining towns?

A. Yes.

Q. What custom prevails among the miners as to having blasting powder on their premises, throughout the regions in which you have placed insurance?

A. Well, it is generally supposed that miners keep blasting powder about their dwellings. I have always understood it in that way.

Q. Don't you know for a fact?

A. Yes; I know it as a fact, that they do keep more or less blasting powder all the time in their dwellings.

Q. Did you have that knowledge at the time you accepted this risk?

A. I certainly had.

70 Q. Was there any extra premium charged by reason of the fact that this house was a miners' dwelling house?

A. Yes; there was.

Q. State what that rate was, and explain fully so that the Court and jury will understand it?

A. The minimum annual rate on coal properties given to us by the Underwriters' Association—speaking of dwellings now, coal, property, miners' dwellings—*is* $.75 per annum. We have the privilege to double that for three years, charge two annual rates for three years, which would be one and a half per cent. Now, this building for occupying was built in seven compartments, so that there were seven families, seven miners' dwellings; the building was built with seven compartments, to be occupied by seven different families, as I found out. I increased the rate because of the occupancy; of the number of occupants; understand, now, we were speaking of rates on miners' dwellings, not on other classes of dwellings; the Underwriters' Association gives us a rate of sixty cents a hundred on single dwellings, or sixty-five cents a hundred on double dwellings, allowing us to double that rate for three years, making it $1.20 for singles and $1.30 for doubles. Now, when I came to write this risk, I looked the situation over, and I concluded, after some figuring, that I would charge one and a quarter per annum, or two and a half per cent for three years, $2.50 a hundred for three years, which I did. The building was not finished, and I charged according to the Underwriters' Association, for a finishing permit for thirty or sixty days—the policy will show which—I think thirty days; three dollars and ninety cents, I think, of extra premium for finishing.

Q. As I understand you, in addition to charging a double rate for a miners' dwelling house you added an additional rate because the dwelling house had not been finished.

A. Yes; I added an extra premium. I am compelled to do that by the Underwriters' Association.

71 Q. What was that extra premium that you charged for what you call carpenters' risk on an unfinished building?

A. $3.90; thirty days' carpenters' risk.

Q. Now, in order to get this perfectly clear, had that house been

intended to be occupied by some other laborer than a miner, what would have been the rate?

A. Well, that would be pretty hard for me to answer, except in this way. I gave you the minimum rate on a single and a double dwelling. Now, I will give you the minimum rate on an ordinary house occupied by one person, and that would be fifty cents per annum, or one dollar a hundred for three years.

Q. Do you double your regular rate on this class of property by reason of the fact that it is to be occupied by miners, who use more or less blasting powder in this business?

A. I almost double the annual rate on miners' dwellings.

Question read.

A. No; I didn't quite double the regular rate, because twice seventy-five would be $1.50.

Q. Well, I will change the form of my question. Did you charge an increased rate by reason of the fact that this building was to be occupied by miners, and having knowledge that they keep more or less blasting powder about their dwelling houses?

A. Yes, I did.

Q. Now, what was that, expressed in percentage?

A. One and a quarter for one year, or two and a half for three years.

Q. After you placed this risk, did not Mr. McPherson, the special agent of this defendant company, sitting here at this table, go with you and look at the risk, and say it was satisfactory?

A. Yes, he did.

Q. After making inquiry as to the rate?

A. Yes, sir.

Cross-examination by Mr. JENNINGS:

Q. Do you have the rates fixed by the Underwriters' Association in writing or in printed form?

A. Yes, I have them.

72 Q. Have you got them there?

A. Yes, sir.

Q. Can you point to us where the schedule was that you followed, and what kind of houses you were insuring?

A. Yes, sir.

Q. You say that you were to charge a certain rate for a single frame house?

A. Yes, sir.

Q. Show me that, if you please?

A. I don't know that I said that. I gave you my rates——

Q. Well, what did you say?

A. I said the rate, the minimum annual rate on coal miners' dwelling given to us——

Q. No, before we talked anything about coal miners. I didn't say anything about coal miners' dwellings in my question. I said, didn't you say there was a certain rate fixed for a single house occupied by one family?

A. Yes, sir.

Q. What is that rate?
A. Fifty cents a hundred for one year.
Q. Have you got that there?
A. I haven't got it with me.
Q. Have you got it anywhere?
A. Certainly, I have it in my ratebook, sir.
Q. Have you got your rate book with you?
A. No, sir; I haven't.
Q. Then you increase that if, instead of being a single house, it was a double house, did you?
A. Yes, sir.
Q. Suppose two houses were built together, with a partition between, would the rate be any more on each one of those houses than it would if a house were standing alone?
A. Are you talking about miners' dwellings?
Q. I am talking about a building. I didn't say miners'. Don't you understand my question?
A. I don't know that I do.
Q. What is the rate for a single frame house standing by itself?
A. A frame with a shingle roof is fifty cents per annum.
73 Q. Suppose you have a double house, two houses with a partition between, shingle roof and frame, would the rate be any greater than for one building standing by itself?
A. If you are speaking about ordinary houses, it would not be.
Q. Why wouldn't it be?
A. Because we are not given it any higher.
Q. Don't you know that in fixing a rate there is always a question of whether a building is detached or whether it is connected with another building?
A. Certainly, and I am giving you the minimum rate of a detached house.
Q. Well, I am asking you about houses that are not detached, where they are built one against another?
A. Well, we take that small one house.
Q. But what if you have two houses built together and occupied by different tenants, with a partition between, doesn't that affect the rate?
A. No, sir. It would be considered one house.
Q. Then suppose you put another one on, and make three houses with two partitions, would that be the same?
A. There is no rule to apply to that. That would be left to your judgment.
Q. Take seven dwelling houses, with partitions between, do you mean to say that you would have insured each one of those seven at the same rate as you would insure one if it stood alone?
A. No, sir.
Q. Then what do you mean?
A. I mean to say it would be up to me to use my judgment.
Q. Why would it be up to you?
A. Because there is no rule to apply to that.
Q. Then you don't increase the rate supposing these to be ordi-

nary tenement houses, because of any rule that has been established by the Underwriters' Association. Do I understand that?

A. No, sir; I didn't; I use my judgmens on increasing any rate.

Q. Well, that was an arbitrary affair, then, of yours?

A. This company leaves that to me.

74 Q. But do the Underwriters' leave that to you?

A. No, sir; they give me a rule to go by.

Q. Well, now, what is the rule they give you to go by?

A. Here is their rate, sir—minimum annual rates on coal property.

Q. I didn't ask you anything about coal property. I asked you about ordinary single dwellings.

A. I have told you I don't have that book with me.

Q. Is there any rule laid down by the Underwriters as to rates in regard to those tenements where you would call it a row, which is the ordinary term in use—do you charge any more than you would if the houses stood alone?

A. There is no rule to apply to that.

Q. Then you are left to your own will, to do as you think best, according to your discretion, are you?

A. In what case?

Q. In what I have just asked you about?

A. You say I was left to my own will?

Q. Were you left, I say?

A. In what case was I left?

Q. In the case that I have just asked you about?

A. I haven't any case of that kind on record.

Q. Suppose you have seven houses, or a row of houses, with partitions between, frame buildings, having a shingle roof, are you left to your own discretion by the underwriters' rates as to what you shall charge on them or not?

A. Yes, sir.

Counsel for plaintiff object, that this was one house with seven partitions, not seven houses.

Q. Did you increase those rates at all because the houses were not detached, or because the danger was increased by the fact that it was a row of seven apartments? Did that have any effect upon your judgment?

A. What have you reference to? This building?

Q. Of course, what else would I have reference to?

A. Yes, I did.

75 Q. On that ground alone?

A. I increased it for this reason, under this rule I increased it.

Q. I didn't ask you about that rule?

A. Well, that's the only rule that I increased it under.

Q. You didn't increase it, you have said, except because you thought it was going to be occupied by coal miners?

A. That was one of the reasons I increased it.

Q. What was the other reason?

A. Because there were seven of them.

Q. Did you increase it proportionately, or did you make it larger on each one of those houses than you would otherwise have done?

A. I didn't just figure that out; I increased it from one and a quarter per cent. to two and a half per cent.

Q. And you did that because it was coal miners' property?

A. Certainly.

Q. Now, I ask you what you would have charged if it was not for coal miners?

A. I don't know what I might have charged, but I wouldn't have charged as much as I did in this case.

Q. You are an insurance agent, you ought to know?

A. Well, I certainly would, when I came to that question.

Q. Who told you that that property was to be occupied by miners?

A. I knew it.

Q. How did you know it?

A. I knew it from my experience in the business.

Q. By your own intuition, did you know it?

A. Well, yes.

Q. Mrs. Penman didn't tell you?

A. No, sir.

Q. You made no bargain with her?

A. No, sir.

Q. You didn't tell her that you increased the rate because she might possibly have that occupied by miners?

A. I didn't talk to Mrs. Penman at all.

Q. To whom did you talk?

A. To her husband and Mr. Truitt, his attorney.

76 Q. Did Mr. Penman talk to you about whether or not that rate was to be increased because it was occupied by miners?

A. I don't think he did. I don't think that entered into our calculations.

Q. But you told Mr. McPherson that that had entered into the calculations?

A. I did.

Q. When?

A. When he was up there inspecting the risk.

Q. You told him you had made an increased charge, because that was to be occupied by miners?

A. Yes, sir.

Q. Where was that, in your office?

A. It might have been in my office, and also on the way up to look at the risk.

Q. How long was that after the risk was written?

A. I can't tell you that. Mr. McPherson was inspecting the risk, and we walked as far as Elk Run Bridge, and he said, "We will not go up. It is very satisfactory." Those were his words.

Q. When you wrote your risks, where did you report to?

A. Where did I send my daily reports.

Q. Yes.

A. We reported to the firm.

Q. They were sent to Mr. McPherson?
A. No, sir.
Q. You were under Mr. McPehrson's instructions.
A. Yes, to a certain extent.
Q. To what extent?
A. He is the special agent and adjuster of the Company.
Q. But you made your reports to the firm.
A. Yes, sir.
Q. When you made your report to the firm, then, did you say anything about having charged an extra rate because you supposed that the property was to be occupied by miners?
A. No, sir; we didn't. Do you mean to say that I said it was going to be occupied by miners?
Q. Yes?
A. No. We never do.
Q. Well, you didn't?
A. No, sir; we didn't and we never do.
77 Q. Well, I am asking you what you did do. You didn't make any report that that building was to be occupied by miners?
A. I don't know why I should write such a thing about this house, when it was not our custom.
Q. Wasn't that special business you were performing rather than acting for the company?
A. Yes, sir.
Q. Did you give them any indication, knowledge or information about that dwelling being presumed to be occupied by miners?
A. Occupied by tenants as dwellings.
Q. And that was in writing, wasn't it?
A. That was in the written part on the form.
Q. Now, you put in the policy, that because the building was unfinished they were to have a risk of thirty days to finish it, and then charged an extra rate, didn't you?
A. Yes, sir.
Q. Well, why didn't you put in the statement your knowledge that there was an extra rate charged because it was to be a miners' dwelling, although not yet occupied by miners?
A. Because it was not our custom.

Redirect examination by Mr. CLARKE:

Q. This was one building occupied by seven different families?
A. Yes, sir seven families in it.
Q. Where was it located with reference to being near the mining region?
A. Well, it was within a few hundred feet of the Elk Run shaft.
Q. And what particular class of people inhabit the particular district that adjoins?
A. Miners, principally.
Q. Now, if this had been a single house, would your rate have been any higher by reason of the fact that it was being occupied by miners?

A. Yes. It would have been sixty cents instead of fifty cents per annum; or, I might say, $1.20 a hundred instead of $1.00 a hundred for three years.

78 *Testimony of Mrs. Alice Potter.*

Mrs. ALICE POTTER, witness called by plaintiff in rebuttal, being duly sworn, testified as follows:

Direct examination by Mr. TRUITT:

Q. On December 7, 1904, the date of that fire, where did you live?
A. In Punxsutawney.
Q. How far from Mrs. Penman's house that was burned down?
A. About 150 feet.
Q. Did you see the fire?
A. Yes, sir.
Q. What was the first thing you saw?
A. The first thing I heard was the woman screaming.
Q. Did you look then?
A. Yes, sir.
Q. Where was she?
A. She was struggling with a man.
Q. Where did you see the fire first?
A. Coming through the window.
Q. The front window?
A. Yes, sir.
Q. Was the house blown to pieces then?
A. No, sir.
Q. The windows in?
A. Yes, sir.
Q. Doors in?
A. Yes, sir.
Q. How was it about anybody moving out after the fire started?
A. The house that was occupied next the one on fire, everybody down stairs was all moved out except the kitchen furniture.
Q. Did you hear any explosion before you saw the fire?
A. No, sir.
Q. Did you know about the people that were burned there that day, how they happened to get burned?
A. There were three of them brought to our house, and the man said his wife was burned trying to get their child.
Q. Trying to get his child?
A. Yes; this child that was burned.
79 Q. Where was the child they were trying to get?
A. He said it was asleep.
Q. Upstairs or down stairs?
A. I understood upstairs.
Q. Did you understand that they had gone in after the child after the fire started?
A. Yes, sir.

Objected to by counsel for defense as hearsay.

By Mr. TRUITT: Well, it was their dying declaration.

By the COURT: You would better not go into that, Mr. Truitt.

By Mr. TRUITT:

Q. How long did the people who told you this live after they told you that?

A. I should judge about four or five days. It was Dominico, the man that rented the house.

Cross-examination by Mr. JENNINGS:

Q. You lived right near that shaft, did you?

A. Yes, sir.

Q. And that shaft makes a good deal of noise, doesn't it?

A. Sometimes.

Q. You were engaged about your ordinary household duties at the time this thing occurred?

A. No, sir.

Q. Where were you?

A. I was dressing in my bedroom.

Q. And your attention was attracted by screaming on the street?

A. Yes, sir.

80 *Testimony of John Humes.*

JOHN HUMES, a witness called for plaintiff, in rebuttal sworn, testified as follows:

Direct examination by Mr. TRUITT:

Q. At the date of this fire, when Mrs. Penman's house was burned down, where did you live?

A. In Elk Run.

Q. That is a suburb of Punxsutawney.

A. Yes, sir.

Q. Did you see the *the* fire?

A. Yes, sir.

Q. Did you see it start?

A. No, sir, I didn't see it start.

Q. Where were you?

A. I was on the sidewalk down below.

Q. How far away?

A. About 200 feet, I suppose.

Q. What was the first thing you saw?

A. The fire.

Q. Had you heard any explosion before that?

A. No, sir.

Q. Were you going towards the property?

A. Yes, sir.

Q. The first thing you saw, in what shape and condition was the house?

A. It was standing just the same as it was before, with the fire starting down through the top.

Q. Had the windows and doors in?
A. Yes, sir.
Q. What part of the house was on fire when you saw it?
A. The south part.
Q. In the front or the back of the room?
A. It was the back part of the house.
Q. How long have you lived in the mining region of Pennsylvania—bituminous mining?
A. I have lived all my life time around them.
Q. Have you worked about them?
A. Yes, sir.

Q. Are you familiar with the purchasing of blasting
81 powder and the keeping of it and using of it by miners?
A. Yes, sir.

Q. Where is their customary place of keeping it?
A. Why, at home.
Q. Right at home?
A. Yes, sir.
Q. What quantity do they take to the mine?
A. From three to five pounds.
Q. Have you worked in the mines?
A. Yes, sir.
Q. How much—and about the mines?
A. I have worked in mines about eighteen years—in and around mines.

No cross-examination.

Testimony of John Crago.

JOHN CRAGO, called for plaintiff, in rebuttal, sworn:

Direct examination by Mr. TRUITT:

Q. At the date of this fire, where did you reside?
A. In Punxsutawney.
Q. How far from this property?
A. About 200 feet.
Q. What was the first thing you saw?
A. I saw the fire.
Q. Had you heard any explosion before you saw the fire?
A. No, sir.
Q. What was the first thing you saw of the fire?
A. The first thing I saw was the back part of the building was on fire; That's on the south side of it.
Q. How was it then as to windows and doors being in and the roof on?
A. Everything seemed to be standing just the way as it was before.
Q. Do you know anything about whether any of the people moved their property out?
A. I do.
Q. You know that they did?

A. Yes, sir.

82 Q. How long have you worked about the mines?

A. Twenty years.

Q. Are you familiar with the miners' use and storage and keeping of blasted powder?

A. Yes, sir.

Q. What is their customary place of keeping it?

A. They generally keep it around the house.

Q. And what quantities do they take to the mines?

A. Five pounds.

Q. Just enough for a shift, as they say?

A. Yes, sir.

No cross-examination.

Testimony of Dr. Frank Lorenzo.

Dr. FRANK LORENZO, called on behalf of plaintiff, in rebuttal, sworn.

Direct examination by Mr. TRUITT:

Q. You are a practicing physician, are you?

A. Yes, sir.

Q. Do you know this witness that was on the stand, the Italian, Frank Moronose?

A. Yes, sir.

Q. How long have you known him?

A. I think the first time I ever saw him was last spring; I think it was in March or April; I am not certain.

Q. Did you treat him at any time for his hands?

A. Yes, sir.

Q. What was wrong with them?

A. When he first came to me he had some very bad scars on both hands, on the upper surface of the hands, that hadn't healed; and he told me he had been in the hospital for something like forty or fifty days, and that the scars wouldn't heal, they kept opening up, and that he couldn't work. So I treated him for that opening, and fixed them up for him.

Q. What caused it?

A. Well, I made an examination of his hands at first and

83 asked him how he had been burned that severely, and he told me that in trying to get out of the fire he had plunged his hands on a stove; he couldn't see there was so much smoke in the room, and in groping around that he had placed both hands on a stove or in a stove, and in that way he had received these severe burns on his hands. I then treated him. He told me something about an explosion that had occurred previous to his trying to get out of the house.

Q. What can you say, from the nature of these burns and their character, from your examination of them, were they occasioned by powder burns?

A. I shouldn't think they would be caused by powder. If, as he

told me, there was an explosion there previous to his trying to get out, he would be so close to the powder that if they had been caused by the powder, I should think I would have seen some of the powder grains.

Q. Well, did you see any?

A. I didn't see any. I think, if I remember exactly, there were a few little blue lines there that might have been caused by some powder or powder smoke being deposited on his hands, but there was no evidence of powder grains there that I could see.

Q. How long have you been about the mines?

A. About thirteen or fourteen years.

Q. Are you familiar with the miners' use and keeping of blasting powder?

A. Yes, sir.

Q. Where do they keep it?

A. Well, they keep it in their homes, in the kitchen, and some of them in the sitting room, and some of them in their bed rooms; and I have seen kegs of powder under their bed.

Q. Especially as to the Italians and Hungarians, what do you say their custom is?

A. Well, it is their custom to keep their powder all in the house. I have often asked them the reason, and they tell me to keep it dry, for one reason, and another reason is that if they would keep it outside everybody would help himself to the powder.

84 Cross-examination by Mr. JENNINGS:

Q. This man had some other burns, hadn't he?

A. He had other burns—where do you mean?

Q. On his face or his back?

A. Well, I didn't see the burns on his back; I don't know anything about that.

Q. You didn't examine his back?

A. No, sir; he didn't tell me anything about that.

Q. But he told you that there had been an explosion, and in the confusion he burned his hands by getting them into the fire some time?

A. He didn't tell me that. He said while he was taking his shoes off there was an explosion and the room was full of smoke and fire, and he tried to get out and he plunegd his hands on a stove.

By Mr. TRUITT:

Q. This man is an Italian, is he?

A. Yes, sir.

By Mr. TRUITT: Now, if your Honor please, we ask the Court to direct a verdict in favor of the plaintiff; and, if the Court doesn't do that, then the question will arise as to whether or not we shall go into the chemical construction of blasting powder.

By the COURT: Well, is the testimony in the case closed?

By Mr. TRUITT: As I understand it, we can ask the Court at any time for binding instructions.

By the COURT: There is no such rule in this Court.

85 *Testimony of James Penman.*

JAMES PENMAN, called for plaintiff, in rebuttal, sworn:

Direct examination by Mr. CLARK:

Q. You are the husband of the plaintiff in this suit?

A. Yes, sir.

Q. In placing the insurance on this property, who placed it? That is, I mean acted for her?

A. Mr. Wester; that is, the contractor.

Q. No: with reference as between your wife and the Insurance Company, did you act for your wife?

A. I acted for my wife; yes, sir.

Q. Did you have other properties in that vicinity that were known as miners' dwellings?

A. Yes, sir.

Q. Did you have any knowledge that there was an increased rate charged for miners' dwellings?

Counsel for defendant object to the question as incompetent and irrelevant, and ask for an offer.

By Mr. CLARKE: We really propose to show that he knew of the fact that they did charge an increased rate for miners' dwellings at the time he placed this insurance for his wife.

By the COURT: Well, how would that affect the question?

By Mr. CLARKE: Only as to the intention of the parties; that they both understood that it covered the question of blasting powder being kept in the miners' houses.

By the COURT: You may prove any talk he had with the agent of the company, or anything of that kind; but as to the abstract question as to what his understanding was, I don't think that is relevant.

86 By Mr. CLARKE: Well, I might ask him if he had that knowledge from previous transactions with Mr. Brown, in placing other policies.

By the COURT: You can prove anything that Mr. Brown said or did.

By Mr. TRUITT: In this way: They insure a stock of store goods, and they say in this policy, for instance, that that doesn't include such and such things; then we can prove what the man says as to his understanding as to what it did include.

By the COURT: You can prove any statements of Mr. Brown's, or any conversation with him. But we will not receive evidence as to his understanding.

Mr. CLARKE: As I understand the witness, the proposition would be in this form: That he owned other dwellings that were occupied by miners, on which he had placed insurance; and that there he acquired the knowledge that there was an increased rate charged for miners' dwellings, and that the reason given to him at that time was, that there was more or less blasting powder kept about miners' residences, and that was one of the reasons for an increased rate.

Objected to as incompetent.

Objection sustained.

87 *Testimony of Louis Wester.*

LOUIS WESTER, recalled for plaintiff in rebuttal.

Direct examination by Mr. TRUITT:

Q. I believe you stated in your testimony yesterday that you reside at Anita in Jefferson County?
A. Yes, sir.
Q. Is that a mining district?
A. Yes, sir.
Q. How long have you resided in that mining district?
A. Somewhere around twenty years.
Q. Are you familiar with the general custom of miners in the keeping and using of blasting powder?
A. Yes, sir.
Q. Where do they, as a custom, keep it?
A. Well, they generally keep it in their homes.
Q. Have you been about some of their homes?
A. Yes; hundreds of them.
Q. You have built a great many homes for them?
A. Yes, sir.
Q. You are a contractor up there?
A. Yes, sir.
Q. And you have acquired your knowledge from personal observation, have you?
A. Yes. I have always known them to keep the powder about the home; in the house, or some keep it under the house, and in different rooms.

No cross examination.

88 *Testimony of W. L. Scott.*

W. L. SCOTT, called on behalf of plaintiff in rebuttal, sworn.

Direct examination by Mr. CLARKE:

Q. Where do you live?
A. Wilmington, Delaware.
Q. What occupation or line of business do you follow?
A. I am one of several managers of the E. I. De Pont Company, in charge of the manufacture of black powder at a number of mills.
Q. How many different mills do you have charge of?
A. About nine or ten.
Q. Is blasting powder a lower degree of explosive than gun powder or dynamite?

Objected to by counsel for defense, that the witness has not shown himself an expert on the subject of gun powder or blasting powder; he is simply one of a board of directors.

The WITNESS: Not at all. That is not my testimony.

By the COURT: We will hear evidence as to his qualifications.

By Mr. CLARKE:

Q. Then state what experience you have had in and about the manufacture of powder.

A. I am thoroughly familiar with the manufacture of powder black powder, both gun powder and blasting powder, having worked in all departments of the manufacture; and I am to-day responsible for the manufacture of blasting powder at a number of mills throughout the country.

Q. Are you in active touch with the process of the manufacture of powder?

A. Absolutely so, all the time.

Question repeated, as follows:

89 Q. Is blasting powder a lower degree of explosive than gun powder or dynamite?

Objected to, as leading.
Objection overruled.

A. A very much lower degree of explosive.
Q. Is dynamite a higher degree of explosive than gun powder?
A. Much higher, sir.

Cross-examination by Mr. JENNINGS:

Q. By what you call black powder, you mean mining powder or blasting powder, do you?
A. Not necessarily so, sir.
Q. What do you mean by black powder?
A. Well, gun powder is black powder and blasting powder is black powder.
Q. Is blasting powder an explosive?
A. Yes, sir.
Q. Mining powder is an explosive, is it?
A. Yes, sir.

Plaintiff rests.

90 SUR-REBUTTAL.

Testimony of D. B. McPherson.

D. B. McPHERSON, recalled by defendant, in sur-rebuttal:

Direct-examination by Mr. JENNINGS:

Q. Do you remember meeting Mr. Brown in Punxsutawney and talking to him about the risk of this property?
A. I do.
Q. Did you hear a statement in his testimony in which he said that he had told you that he had charged an extra rate because that building was intended to be occupied by mining tenants?
A. I heard that statement; yes.

Q. Did he make any such statement to you?
A. He did not.
Q. What was the subject of your conversation?
A. The only subject of our conversation was as to the amount of insurance—whether $2,600 on an unprotected tenement house of that size was the right amount for the company to carry.
Q. In other words, whether it was a good risk or not?
A. Whether it was a good risk; yes, sir.

Cross examination by Mr. CLARKE:

Q. Mr. Brown is general agent of the defendant company, located in the vicinity?
A. Mr. Brown is a local agent.
Q. Well, he is a general agent?
A. He is not what we call a general agent in the insurance business.
Q. He has written authority, representing you, as a general agent for placing insurance?
A. Not as a general agent, Mr. Clarke. He has authority
91 to find and write risks and collect the premiums thereon within a certain territory.
Q. How long has he been your agent?
A. I can't answer that question. I have had charge of this territory nearly six years; he has been our agent during that time. How much longer than that I can't answer, without looking at the books.

By Mr. JENNINGS:

Q. What do you mean by general agent?
A. A general agent, as understood in the business, is a man who has the management of a large territory, usually a large number of States, or sometimes just one State, to whom the local agents refer their business.
Q. He was not that kind of an agent?
A. He was not.

Defendant rests.
Testimony closed.

Plaintiff submits, that under all the evidence, the verdict should be for the plaintiff for the amount of the insurance, with interest from the date of the fire.

Counsel for defendant submit certain points upon which the Court is requested to charge the jury, which points will be set out and answered in the Charge of the Court.

Requests by both sides for binding instructions in favor of their respective clients refused by the Court.

Mr. W. K. Jennings addressed the jury on behalf of defense. Followed by Mr. Truitt for the plaintiff. After which, the Court charged the jury as follows:

92 *Defendant's Points.*

Defendant's counsel respectfully request the Court to charge the jury as follows, to wit:

First. Under all the evidence the verdict should be for the defendant.

Refused.

Second. If the Court should refuse to charge as requested in the first point then:

In as much as the policy in suit provides that—"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * (any usage or custom of trade or manfuacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding 25 pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosine oil of the United States standard." If the jury believe from the evidence that the plaintiff kept, used or allowed on the said premises any of the articles of merchandise prohibited in the policy, then the plaintiff cannot recover in this action and the verdict should be for the defendant.

If the jury finds under the evidence that blasting powder was one of the articles prohibited by the clause above quoted this point is affirmed.

Third. If the jury believe from the evidence that the plaintiff, or her tenant, or tenants, kept, used or allowed on the insured premises blasting powder or other explosive, except gunpowder exceeding twenty-five pounds in quantity, the policy thereby became and remained void, and the plaintiff cannot recover in this action and the verdict should be for the defendant.

93 If the jury find under the evidence that blasting powder was one of the articles prohibited by the clauses above quoted, this point is affirmed.

Fourth. If the jury believe from the evidence that the plaintiff or her agent kept, used or allowed an explosive of some kind upon the premises, and that an explosion resulted therefrom, which damaged the insured building, the burden is upon the plaintiff to show what the explosive was, and that it was one permitted by the policy and, failing to do this, the verdict should be for the defendant.

This point is refused.

Fifth. If the jury believe from the evidence that the plaintiff's property was damaged both by an explosion and a fire, and that the explosion preceded the fire, under the terms of the policy the plaintiff, if entitled to recover at all, can only recover for the damage done by the fire exclusive of that done by the explosion.

Affirmed.

Sixth. If the jury should believe from the evidence that the facts are as stated in the last preceding point, the burden is upon the plaintiff to furnish sufficient evidence to enable the jury to separate

he damage by the fire from the damage by explosion; but the mat-
er cannot be left to conjecture.

Trial point we affirm.

Seventh. The evidence being uncontradicted that there was an ex-
losion which preceded the fire, and the plaintiff not having offered
ny evidence by which the jury could separate the damage by the
xplosion from the damage by the fire, she cannot recover in this
ction and the verdict must be for the defendant.

This point in effect asks us to take this case from the jury This
e decline to do.

4 *Charge of the Court.*

UFFINGTON, *J.*:

Gentlemen of the Jury: This is an action of assumpsit, brought
y Mrs. Annie E. Penman against the St. Paul Fire and Marine
nsurance Company. The plaintiff in the case being a citizen of the
tate of Pennsylvania, and the defendant a citizen of the State of
linnesota, and the amount in controversy being more than $2,000,
he Circuit Court of the United States has jurisdiction of the case,
nd it becomes your duty to pass upon the issues of fact involved
this case.

This suit is brought upon a policy of insurance issued by the
efendant company, insuring for the term of three years from the
th day of February, 1904, the property of Mrs. Penman, near
unxsutawney, Jefferson County for the sum of $2,600.

On the 7th day of December, 1904, according to the proofs in this
se, that property was consumed by fire, the house in question was
rned. Notice was given to the insurance company and proofs of
ss were furnished to them, all of which the plaintiff showed, and
roved the value of the property; and that made out what the law
lls a *prima facie* case and entitled her to recovery unless the de-
ndant showed that it was not liable for the loss that had occurred.
This the Insurance Company claims to have done And the
rounds on which that claim is made have been fully discussed to
u by counsel in the case.

The policy provides that "This entire policy, unless otherwise pro-
ded by agreement endorsed hereon or added hereto, shall be void,
there be kept, used or allowed on the above described premises ben-
ne, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gun-
wder, exceeding twenty-five pounds in quantity, naphtha, nitro-
glycerine, or other explosives."

5 You will see, gentlemen, by that policy, which you will
have before you, that it was provided by the contract (and
at contract, of course, measures the rights and liabilities of these
rties) that the policy was to be void in case these articles which I
ve read were "kept, used or allowed on the above described prem-
es." And it appearing from the evidence in the case that this prop-
ty was insured and permitted to be occupied by tenants, the act
the tenant is to be construed as the act of the owner of the prop-
ty.

The first question, therefore, to be determined is, whether this clause of the contract was violated. It is alleged by the defendant in the case that it was violated by the tenants having on the property one of these excepted articles, to-wit, a quantity of blasting powder, powder used for the mining of coal, and that this keeping, using, and allowing of this blasting powder, an explosive, upon the premises by the tenant violated the terms of the contract, or rendered the contract not binding upon the defendant.

Now, gentlemen, it is alleged that blasting powder was included among these articles by the term, "or other explosives." Ordinarily it is the duty of a Court to construe a written instrument and instruct the jury what the terms mean. But in this case, under the facts and the proofs here, bearing in mind the words of the policy and the testimony of Mr. Brown in reference to this property being used as a miners' house, and the testimony that the miners are in the habit of keeping blasting powder on the premises, and also the testimony in regard to the fact that an extra charge (if such be the case) was made in this case by reason of the fact that it was a miners' residence, we have decided to leave to you, as a question of fact for you to determine, whether, under the evidence and the facts proven here, blasting powder is included in the term "other explosives." In other words, whether it was the intention of the Insurance Company, when it issued this policy through Mr. Brown, to provide
96 therein that if blasting powder was kept, used or allowed on this premises, the policy was to be void, and of no effect.

If you find, gentlemen, under the evidence in the case, that the term "blasting powder" was not included as one of the excepted articles under this policy, it then becomes your duty to inquire further in the case. If you find it was, and that it was one of the prohibited articles in this policy, then, unfortunate as may be the situation for the plaintiff in this case, she is not entitled to recover, because the rights of the parties must be founded on their contract rights, and not on sympathy or good will or feelings of kindness toward people who have suffered a loss of this kind.

If you determine that question, that blasting powder was not one of the prohibited articles, we then pass on to consider the next question. The company says that this loss was caused by an explosion. And we turn to the policy to see what the effect of an explosion is. The policy provides that the company shall not be liable for thus and so, or unless fire ensues, and, in that event, for the damage done by the fire only, and not that done by the explosion. If there was an explosion in this case, and a fire ensued as the result of that explosion, the company is not liable for the damage that was done by the explosion, but only for the damage which was caused by the fire which ensued after the explosion. It will be for you to determine that fact, whether there was an explosion here, and if so, you will only charge the defendant, in case you find in favor of the plaintiff, for the loss that was occasioned by the fire after the explosion, and not for the damage that was done to the property by the explosion itself.

Bearing these suggestions in mind, it will be your duty to determine this case, and in doing so, to give it your calm, careful and un-

prejudiced consideration, in determining the rights of these parties, not on the basis that there has been a fire, which naturally excites our sympathies, and not on the basis that the plaintiff here is
97 a woman and the defendant a corporation, but on the basis of what the real rights of these parties are. And whatever those rights are, under the instructions of the Court and the findings of facts as you make them, your verdict ought to be in accord with those facts and those findings, without regard to questions of sympathy or good will.

The parties have asked me to give you certain instructions.

The defendant has asked me to charge you as follows:

(1) That under all the evidence, the verdict should be for the defendant.

Answer. That point is refused. Whether the verdict should be for the defendant is a question for the jury to determine.

(2) If the Court should refuse to charge as requested in the first point, then, inasmuch as the policy in suit provides, "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gun powder, (exceeding 25 lbs. in quantity), naphtha, nitro-glycerine or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosene oil of the U. S. standard." If the jury believe from the evidence that the plaintiff kept, used or allowed on the premises any of the articles of merchandise prohibited in the policy, then the plaintiff cannot recover in this case, and the verdict should be for the defendant.

Answer. If the jury find, under the evidence, that blasting powder was one of the articles prohibited by the section above quoted, this point is affirmed.

(3) If the jury believe from the evidence that the plaintiff or her tenant or tenants, kept, used or allowed on the insured prem-
98 ises blasting powder or other explosives except gun powder (not) exceeding twenty-five pounds in quantity, the policy thereby became and remained void, and the plaintiff cannot recover in this case and the verdict should be for the defendant.

Answer. This point is affirmed. If the jury find, under the evidence, that blasting powder was one of the articles prohibited by the clause above quoted.

(4) If the jury believe from the evidence that the plaintiff or her agent kept, used or allowed an explosive of some kind upon the premises and that an explosion resulted therefrom which damaged the insured dwelling, the burden is upon the plaintiff to show what the explosive was, and *and* that it was (not) one prohibited by the policy, and failing to do this, the verdict should be for the defendant.

Answer. This point is refused.

(5) If the jury believe from the evidence that the plaintiff's property was damaged by an explosion and a fire, and that the explosion preceded the fire, under the terms of the policy the plaintiff, if en-

titled to recover at all, can only recover for the damage done by the fire, exclusive of that done by the explosion.

Answer. That point is affirmed.

(6) If the jury should believe from the evidence that the facts as stated in the last preceding point, the burden is upon the plaintiff to produce sufficient evidence to enable the jury to separate the damage by the fire from the damage by the explosion, but the matter cannot be left to conjecture.

Answer. This point is affirmed.

(7) The evidence being uncontradicted that there was an explosion which preceded the fire, and that plaintiff not having offered any evidence by which the jury can separate the damage by the explosion from the damage by the fire, she cannot recover in this action, and the verdict must be for the defendant.

Answer. This point, in effect, asks us to take the case from the jury, and this we decline to do.

99 The Court did not read and answer plaintiff's points, except to refuse the first point, which asked for binding instruction in favor of plaintiff.

Counsel for the defendant except to the refusal of the Court to affirm all of its points, and also to that portion of the charge which left the jury to say whether blasting powder was included under the terms of exception.

Counsel for defendant except to the Court's answers to defendant's 2d, 3d, 5th and 6th points, and also to that portion of the charge where he submitted the construction of the contract to the jury.

Also, there being no evidence on the part of the defendant as to the nature of blasting powder, the Court erred in submitting that question to the jury to find as a question of fact whether blasting powder was included in the prohibitory articles named in the policy.

Motion for a New Trial.

And now, to-wit December 12, 1905, the defendant company by Jennings & Jennings, its counsel, appears and moves the Court for a new trial in the above stated cause for the following reasons:

First. The Court erred in refusing the defendant's first and other points.

Second. The Court erred in over-ruling the defendant's objection to the offer in regard to the introduction of Brown's testimony as to the increased premium, etc.

Third. The Court erred in submitting to the Jury the question as to whether the parties meant to include blasting powder as one of the "other explosives" mentioned in the policy.

JENNINGS & JENNINGS,
Attorneys for Defendant.

100 *Opinion of the Court. Sur-Motion for New Trial.*

BUFFINGTON, *J.*:

In this case there was no question of the original validity of the policy and that by receipt of the premium by the defendant and delivery of the policy a valid contract of insurance was duly created. The question at issue was whether the policy was at the time of the fire invalidated by reason of the tenant having blasting powder on the premises. Under the evidence before us we think the question was for the jury to determine whether blasting powder was one of the prohibited articles which was to invalidate the policy. It was contended by one side it was embraced under the term "other explosives:" by the other, that it was not. While of course blasting powder is an explosive and is therefore covered by the generic term "other explosives," yet the fact that other explosives of the general character of blasting powder and those too of a much more dangerous character than blasting powder, to wit, dynamite and gunpowder, of which twenty-five pounds were permitted, were specified, it was contended that the express mention of these more dangerous powders, evidenced an intent not to cover the less dangerous article of blasting powder under the general term of "other explosives." In addition to this there was proof of the fact that under the mining laws of the state miners could only take two pounds of blasting powder into the mines; that it was a general and recognized practice for them to keep it in their homes; that this was known to the agent who negotiated this insurance and that an extra premium rate was charged on miners' dwellings on that account and such extra premium was collected on this policy. Under these facts the court squarely submitted to the jury by the answer to the third point and the
101 general charge, the question whether blasting powder was included in the term "other explosives." The jury by their verdict have said it was not and under the proofs in the case we have no cause to differ from such finding. Defendant's counsel strenuously urge that The Northern Assurance Company vs. Grand View Company, 183 U. S. 308, is decisive of the present case. We cannot accede to that view. In that case there was no question as to what the policy provided. In the present case the crucial question was as to what the policy in question covered by the term "other explosives." If it covered blasting powder, the jury were instructed the policy was void, just as the court held in the case cited above. Holding, as we do, the question was one for the jury; satisfied as we are, the verdict was just, and that the defendant company was paid for this specific risk for which it now seeks to avoid the policy, our duty is clear to deny the motion for a new trial. The clerk will enter judgment on the verdict.

102 *Petition for Writ of Error.*

To the Honorable Judges of the said Court:

The St. Paul Fire & Marine Insurance Company, the above named plaintiffs in error, conceiving themselves to be aggrieved by the final judgment of the Circuit Court of the United States for the Western District of Pennsylvania in the above entitled cause, hereby make application for a writ of error to the said Circuit Court of the United States for the Western District of Pennsylvania from the United States Circuit Court of Appeals for the Third Circuit and prays that said writ of error may be allowed and that a transcript of the records and proceedings and the papers in said cause to be authenticated may be sent to the said Court of Appeals.

JENNINGS & JENNINGS,
Attorneys for Defendant.

Order.

And now, to-wit, April 9, 1906, on motion of counsel for plaintiffs in error, a writ of error is allowed, as prayed for.

JOSEPH BUFFINGTON, *Judge.*

103 *Bond.*

Know all men by these presents, that we, the St. Paul Fire & Marine Insurance Company, a corporation existing under and by virtue of the laws of the State of Minnesota, principal, and the United States Fidelity & Guaranty Company of Baltimore, a corporation existing under and by virtue of the laws of the State of Maryland, surety, are held and firmly bound unto the United States of America in the sum of Fifty-five hundred dollars to be paid to the said obligee, its certain attorney or assigns, to which payment, well and truly to be made, we do bind ourselves, our successors and assigns firmly by these presents.

Witness the signature of said principal and the seal of said surety this 13th day of March, 1906.

Whereas, the said St. Paul Fire & Marine Insurance Company, above named, has sued out a writ of error from the United States Circuit Court of Appeals for the Third Circuit to review a judgment rendered by the Circuit Court of the United States for the Western District of Pennsylvania in a certain cause therein pending at No. 30 November Term, 1905, wherein Mrs. Annie E. Penman is plaintiff and the St. Paul Fire & Marine Insurance Company is defendant.

Now the condition of this obligation is such that if the said plaintiffs in error shall prosecute said writ of error with effect and answer all costs and damages if they fail to make good their plea, then this

obligation to be void, otherwise to be and remain in full force and virtue.

ST. PAUL FIRE & MARINE INSURANCE CO.,
By D. M. MACPHERSON, *Special Agent.*

Attest:
D. C. JENNINGS.

THE UNITED STATES FIDELITY & GUARANTY CO. [SEAL.]
GEO. S. GRAHAM, *Attorney in Fact.*

And now, to-wit, April 9, 1906, the within bond presented and approved.

JOS. BUFFINGTON, *Judge.*

104 *Assignments of Error.*

And now, to-wit, March —, 1906, the Court erred in refusing the defendant's first point, which point and answer are as follows:

First. "(1) That under all the evidence, the verdict should be for the defendant.

Answer. That point is refused. Whether the verdict should be for the defendant is a question for the jury to determine."

Second. The Court erred in not giving an unqualified affirmance of the defendant's second point, which point and answer are as follows:

"(2) If the Court should refuse to charge as requested in, the first point, then, inasmuch as the policy in suit provides, "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * (any usage or custom or trade or — to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fire-works, gasoline, Greek fire, gun powder (exceeding 25 lbs in quantity), naptha, nitro-glycerine or other explosives, phosphorous, or petroleum or any of its products of greater inflammability than kerosene oil of U. S. standard," if the jury believe from the evidence that the plaintiff kept, used or allowed on the premises any of the articles of merchandise prohibited in the policy, then the plaintiff cannot recover in this case, and the verdict should be for the defendant.

Answer. If the jury find under the evidence, that blasting powder was one of the articles prohibited by the section above quoted, this point is affirmed."

105 Third. The Court erred in not giving an unqualified affirmance of the defendant's third point, which point and answer are as follows:

"(3) If the jury believe from the evidence that the plaintiff, or her tenant or tenants, kept, used or allowed on the insured premises blasting powder or other explosives except gun powder (not) exceeding twenty-five pounds in quantity, the policy thereby became

and remained void, and the plaintiff cannot recover in this case and the verdict should be for the defendant.

Answer. This point is affirmed. If the jury find, under the evidence, that blasting powder was one of the articles prohibited by the clause above quoted."

Fourth. The Court erred in refusing the defendant's fourth point, which point and answer are as follows:

"(4) If the jury believe from the evidence that the plaintiff or her agent kept, used, or allowed an explosive of some kind upon the premises and that an explosion resulted therefrom which damaged the insured dwelling, the burden is upon the plaintiff to show what the explosive was, and that it was (not) one prohibited by the policy, and failing to do this, the verdict should be for the defendant.

Answer. That point is refused."

Fifth. The Court erred in refusing the defendant's seventh point, which point and answer are as follows:

"(7) The evidence being uncontradicted that there was an explosion which preceded the fire, and the plaintiff not having offered any evidence by which the jury can separate the damage by the explosion from the damage by the fire, she cannot recover in this action, and the verdict must be for the defendant.

Answer. This point, in effect, asks us to take the case from the jury, and this we decline to do."

106 Sixth. The Court erred in the general charge in using the following language, to wit:

"Ordinarily it is the duty of a Court to construe a written instrument and instruct the jury what the terms mean. But in this case, under the facts and proofs here, bearing in mind the words of the policy and the testimony of Mr. Brown in reference to this property being used as a miners' house, and the testimony that miners are in the habit of keeping blasting powder on the premises, and also the testimony in regard to the fact that an extra charge (if such be the case) was made in this case by reason of the fact that it was a miners' residence, we have decided to leave to you, as a question of fact for you to determine, whether, under the evidence and the facts proven here, blasting powder is included in the term "other explosives." In other words, whether it was the intention of the Insurance Company, when it issued this policy through Mr. Brown, to provide therein that if blasting powder was kept, used or allowed on this premises, the policy was to be void and of no effect."

Seventh. The Court erred in overruling the objection of defendant's counsel to the offer, which offer and objection are as follows:

"By Mr. CLARKE: We propose to prove by the witness on the stand that he is an agent of the St. Paul Fire and Marine Insurance Company, the defendant, and placed the policy on this building that was destroyed; that he knew at the time he placed it that it was a miners' dwelling house, to be occupied by miners; that he has had fifteen or twenty years' experience in placing insurance on properties of this class, and that he knows, and knew at the time he placed the risk, that it was the common and ordinary custom for all miners to

keep more or less blasting powder about their premises; that
107 he had that knowledge at the time the risk was placed; and also that the insurance company charged an increased rate on the building insured, solely on the ground that it was rated as a miners' dwelling house."

"By Mr. JENNINGS: We object to the proposed evidence, as incompetent and irrelevant; first, because the policy in suit shows on its face that the building was an unfinished one, and that there was a privilege to finish it and that it was to be occupied by tenants; second, that there is an absolute prohibition in the policy itself against the keeping, using *of* allowing of certain explosives, and following with the general term, "and other explosives."

"After hearing the argument of counsel on this offer, the objections were overruled by the Court and an exception granted to defendant."

Bill of Exceptions.

Be it remembered that on the trial of this cause in this court at No. 30 November Term, 1905, the Honorable Joseph Buffington, Judge, presiding, the following proceedings were had, to wit:

The jury was impanelled and sworn according to law and thereupon the plaintiff, to sustain the issue on her part, offered the testimony as taken at the trial of this cause on the 7th and 8th days of December, 1905, and the defendant offered testimony in reply, the whole testimony being as follows: * * * The plaintiff made the following offer of evidence by a witness on the stand which was objected to by the defendant, and objecton overruled by the court:

By Mr. CLARK: "We propose to prove by the witness on the stand that he is an agent of the St. Paul Fire and Marine Insurance Company, the defendant, and placed the policy on this building
108 that was destroyed; that he knew at the time he placed it that it was a miners' dwelling house, to be occupied by miners; that he has had fifteen or twenty years' experience in placing insurance on properties of this class, and that he knows, and knew at the time he placed the risk, that it was the common and ordinary custom for all miners to keep more or less blasting powder about their premises; that he had that knowledge at the time the risk was placed; and also that the insurance company charged an increased rate on the building insured, solely on the ground that it was rated as a miners' dwelling house."

By Mr. JENNINGS: "We object to the proposed evidence as incompetent and irrelevant. First, because the policy in suit shows on its face that the building was an unfinished one, and that there was a privilege to finish it and that it was to be occupied by tenants; Second, that there is an absolute prohibition in the policy itself against the keeping, using or allowing of certain explosives and following with the general term 'and other explosives.'

After hearing the argument of counsel on this offer the objections are overruled by the Court and exception granted by the defendant."

To which overruling of the objection defendant did then and there except and request that a bill be sealed for the defendant. And,

thereupon, at the conclusion of the testimony defendant requested the court to instruct the jury that under all the evidence the verdict should be for the defendant, as in the First, Second, Third, Fourth and Seventh points submitted, which instructions the Court refused, as appears in the answer of the Court thereto, to which answers and ruling the defendant did then and there except and request that a bill be sealed for the defendant. And, thereupon, the learned Court did charge the jury as follows:

"Ordinarily it is the duty of a Court to construe a written
109 instrument and instruct the jury what the terms mean. But in this case, under the facts and the proofs here, bearing in mind the words of the policy and the testimony of Mr. Brown in reference to this property being used as a miner's house, and the testimony that miners are in the habit of keeping blasting powder on the premises, and also the testimony in regard to the fact that an extra charge (if such be the case) was made in this case by reason of the fact that it was a miners' residence, we have decided to leave to you, as a question of fact for you to determine, whether, under the evidence and the facts proven here, blasting powder is included in the term 'other explosives.' In other words, whether it was the intention of the Insurance Company, when it issued this policy through Mr. Brown, to provide therein that if blasting powder was kept, used or allowed on this premises, the policy was to be void, and of no effect."

To which said charge the defendant did then and there except and request that a bill be sealed for the defendant. And, thereupon, the aforesaid Judge, at the request of counsel for defendant, hath to this bill of exceptions, in pursuance of the request of the defendant and of the law, put his seal this 15th day of September, 1906.

JOS. BUFFINGTON, *Judge*.

110 *Writ of Error.*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Western District of Pennsylvania, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a *plea* which is in the said Circuit Court before you, between Mrs. Annie Penman, plaintiff, vs. St. Paul Fire and Marine Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia on the 4th day of September next, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit

Court of Appeals may cause further to be done to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of August, A. D. 1906.

H. D. GAMBLE, *Clerk*.

Allowed by
JOS. BUFFINGTON, *Judge*.

111 *Citation.*

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

Mrs. Annie Penman, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Third Circuit, to be holden at Philadelphia, in said Circuit, on the sixth day of September, next, pursuant to an appeal and Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Western District of Pennsylvania, wherein St. Paul Fire and Marine Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any you know or have to say, why the judgment rendered against the said plaintiff in error as in the said writ of error appears, should not be duly corrected and full and speedy justice done to the parties aforesaid in this behalf.

Witness my hand this 6th day of August, 1906.

JOS. BUFFINGTON, *Judge*.

Service accepted this 25th day of August.

A. A. TRUITT,
Attorney for Defendant in Error.

112 *Certificate.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, Clerk of the Circuit Court of the United States for the said District, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above entitled case, so full and entire as the same remains of record and on file in my office.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this 15th day of September, A. D. 1906.

[SEAL.] H. D. GAMBLE, *Clerk*.

113 And afterwards, to-wit: on the twelfth day of December, A. D., 1906, this cause being called for argument on the transcript of record from the Circuit Court of the United States, for the Western District of Pennsylvania, before Hon. George Gray, Circuit Judge, and Hon. James B. Holland and Hon. William M. Lanning, District Judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for consideration thereof.

And afterwards, to-wit: on the twenty-fifth day of February, A. D. 1907, comes the parties aforesaid by their counsel aforesaid, and the court now being fully advised in the premises render the following opinion (Holland, District Judge, dissenting) to-wit:

In the United States Circuit Court of Appeals for the Third Circuit.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff in Error,
v.
ANNIE E. PENMAN, Defendant in Error.

In Error to the United States Circuit Court for the Western District of Pennsylvania.

Before Gray, Circuit Judge, and Holland and Lanning, District Judges.

LANNING, *District Judge:*

The defendant in error commenced this action against the plaintiff in error to recover the amount of an insurance policy issued by the plaintiff in error to the defendant in error on February 4, 1904. The building covered by the policy was destroyed by fire on December 7, 1904. It had been occupied by tenants who were
114 miners and who were keeping in it, for use in their trade, blasting powder. One of the tenants accidentally threw a lighted fuse into an open can of blasting powder which resulted in an explosion and the fire. The defendant in error recovered a verdict and judgment, and the plaintiff in error now seeks to have the judgment reversed because of alleged errors in the trial of the action.

The policy contains these provisions: "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed, on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naptha, nitro-glycerine, or other explosives. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall

have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The trial court permitted parol testimony to be given to the effect that the local agent of the insurer, Mr. Brown, by whom the policy was delivered to the insured, knew, at the time of its delivery, that the building would soon be occupied by miners as tenants, and that it was the custom of miners to keep blasting powder in their
115 houses, and that because of these facts Mr. Brown charged the insured a rate of insurance higher than the customary rate for tenement buildings. There was no proof that the insured knew that she had paid more than an ordinary rate for her insurance, and there was nothing on the face of the policy that showed it. Other testimony was admitted to prove that dynamite and gunpowder are more powerful explosives than blasting powder. In the charge to the jury the trial court said: "Now, gentlemen, it is alleged that blasting powder was included among these articles by the term 'or other explosives'. Ordinarily it is the duty of a court to construe a written instrument and instruct the jury what the terms mean. But in this case, under the facts and proofs here, bearing in mind the words of the policy and the testimony of Mr. Brown in reference to this property being used as a miner's house, and the testimony that miners are in the habit of keeping blasting powder on the premises, and also the testimony in regard to the fact that an extra charge (if such be the case) was made in this case by reason of the fact that it was a miner's residence, we have decided to leave it to you, as a question of fact for you to determine, whether, under the evidence and the facts proven here, blasting powder is included in the term 'other explosives'. In other words, whether it was the intention of the Insurance Company, when it issued this policy through Mr. Brown, to provide therein that if blasting powder was kept, used or allowed on the premises, the policy was to be void and of no effect."

If the language of the policy on the point of keeping blasting powder on the insured premises is obscure, it was proper to admit parol testimony to explain its meaning, and to submit to the jury, as a question of fact, any disputed question concerning its meaning. Otherwise, as stated by the court in the charge, it was the duty of the court to construe the language. The counsel for the defendant in error contend that the proof that blasting powder is an ex-
116 plosive of lower power than dynamite or gunpowder required the words "or other explosives" to be limited in meaning so that they shall include no substance of lower explosive power than gunpowder. But we think that such an application of the maxim *noscitur a sociis* is too narrow. The general words "or other explosives" are associated not alone with dynamite and gunpowder,

but also with benzine, Benzole, ether, fireworks, gasoline, Greek fire, naptha and nitro-glycerine. For aught that *that* appears in the record of the case, some of the specifically prohibited substances are explosives of lower power than dynamite or gunpowder, or even than blasting powder. Greek fire, for example, is a term that was applied to explosives for centuries before the invention of gunpowder or blasting powder. In the absence of proofs on the point, it is fair to assume that Greek fire is an explosive of lower degree than gunpowder or blasting powder. There is no evidence to show the explosive power of benzine, benzole, ether, gasoline or naptha, as compared with that of blasting powder. The relative explosive powers of these substances is not a matter of common knowledge, if blasting powder is less dangerous than some of them but more dangerous than others, it is included in the general words as *ejusdem generis* with the substances that are specifically named. If its explosive power is of a lower degree than that of any of the substances specifically named, and if, for that reason, it is not *ejusdem generis* with the substances specifically named (a point on which no opinion is expressed), then, since the general words in their literal and natural meaning include blasting powder, the burden was on the insured to show its lower explosive power. To hold, under the present proofs, that the general words "or other explosives" do not include blasting powder merely because it is a less dangerous explosive than dynamite or gunpowder, when it may be more dangerous than Greek fire, benzine, benzole, ether, gasoline, or naptha, is virtually to decide arbitrarily that no meaning or effect shall be given to the gen-
117 eral words. We are satisfied that this cannot be done, and that, as the proofs stand, the general words include blasting powder.

Another point relied on by the counsel of the insured is that the jury must have concluded that when Mr. Brown delivered the policy to the plaintiff he knew the building was soon to be occupied by miners, and that it was the custom of miners to keep blasting powder in their houses, and that, for these reasons, he charged a higher rate of insurance than he otherwise would have charged. Therefore, it is argued, the jury must have found that Mr. Brown intended that blasting powder should be excluded from the list of explosives which the policy prohibited the insured from keeping on the premises. The parol testimony offered had also for its purpose the proving of this alleged intention, notwithstanding the express provision of the policy that no agent of the insurer should have the power to waive any provision of the policy unless the waiver should be endorsed thereon. Such testimony was not admissible unless, in the circumstances stated, the court could properly permit the jury to search elsewhere than in the language of the policy for the intention of the parties. No fraud or mutual mistake of facts is alleged. Assuming that the words "or other explosives" include blasting powder, the proposition is that the contract between the parties may be shown by parol testimony to have been something different from that expressed in the policy. While cases may be cited in which parol testimony has been allowed to modify the terms of policies of insurance, even where those

licies have been free from ambiguity or obscurity and from fraud
mistake, the rule to be applied by our federal courts, at least, in
e construction of such instruments, is the same as that applied in
e construction of other written contracts. In Assurance Company
Building Association, 183 U. S., 308, Mr. Justice Shiras, at page
331, quoted, with approval, the following language in another
8 case: "To except policies of insurance out of the class of con-
tracts to which they belong, and deny them the protection
the rule of law that a contract which is put in writing shall not be
ered or varied by parol evidence of the contract the parties in-
ded to make, as distinguished from what appears, by the written
ntract, to be that which they have in fact made, is a violation of
e principle that will open the door to the grossest frauds. * * *
court of law can do nothing but enforce the contract as the parties
ve made it. The legal rule that in courts of law the written con-
act shall be regarded as the sole repository of the intentions of the
rties, and that its terms cannot be changed by parol testimony, is
the utmost importance in the trial of jury cases, and can never
departed from without the risk of disastrous consequences to the
ghts of parties." And on page 361 he declared that "contracts in
iting, if in unambiguous terms, must be permitted to speak for
emselves, and cannot by the courts, at the instance of one of the
rties, be altered or contradicted by parol evidence, unless in case
fraud or mutual mistake of facts," and that "this principle is
plicable to cases of insurance contracts as fully as to contracts on
her subjects." To the same effect see Modern Woodmen of Amer-
a, v. Tevis, 117 Fed., pp. 372 to 375, and Connecticut Fire In-
rance Co. v. Buchanan, 141 Fed. 877, and especially pages 895
897.

We think the policy in suit prohibited the keeping of blasting pow-
r on the insured premises, that parol testimony was improperly
mitted to vary the terms of the policy, and that the trial court
ould have directed a verdict for the defendant in accordance with
request.

The judgment of the circuit court is therefore reversed, with
ts.

9 (Indorsed:) United States Circuit Court of Appeals, Third
Circuit. St. Paul Fire & Marine Insurance Company, Plain-
in Error, v. Annie E. Penman, Defendant in Error. Opinion.
led February 25, 1907.

120 In the United States Circuit Court of Appeals for the Third Circuit.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff in Error,
vs.
ANNIE E. PENMAN, Defendant in Error.

In Error to the United States Circuit Court for the Western District of Pennsylvania.

Before Gray, Circuit Judge, and Holland and Lanning, District Judges.

Dissenting Opinion.

HOLLAND, *J.*:

I am unable to agree with the majority of the court in the conclusion at which they arrive in this case. The court below is reversed, and the reasons assigned are that the "policy prohibited the keeping of blasting powder on the insured premises, and that parol testimony was improperly admitted to vary the terms of the policy, and that the trial court should have directed a verdict for the defendant in accordance with its request."

It is conceded to be a binding rule that "in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony", but, in the trial of this case, this principle was not in the least violated, nor was the parol testimony admitted for the purpose of varying the terms of the policy, as we view the case. Certain hazardous explosives specifically named, were prohibited from being kept or used upon the insured premises. Blasting powder was not named, but following the enumeration of the explosive excluded, the phrase "other explosives" was used, and notwithstanding the fact that blasting powder was not in terms excluded, it is now held by the plaintiff in error that blasting powder was ex-
121 cluded under the general terms "other explosives". The parol testimony was admitted, not for the purpose of varying the terms of the contract, but for the purpose of showing that blasting powder was not an "explosive" of the same kind as those enumerated, but was one of a much lower explosive force, and that it was a custom, arising out of the necessity of the coal mining business, for miners to keep blasting powder, in small quantities, for use in the mines, upon their premises, and that the insurance company, knew this custom prevailed in this community long before and at the time this insurance was effected, and that it knew these houses were to be tenement houses in this mining district where the custom prevailed, and that the company, through its agent, Brown collected an additional premium for the risk resulting from the recognized and known custom of keeping blasting powder upon the premises. Blasting powder not having been specifically excluded, as I shall show hereafter, it was proper to admit the evidence

for the purpose of ascertaining the understanding of the parties to the contract at the time it was executed.

This judgment should be affirmed for two reasons:

First. This being a clause in an insurance policy, the language of which tends to work a forfeiture, should be construed most liberally in favor of continuing the insurance, and the general words "other explosives" should be restricted to explosives of a like kind and degree of hazard as those previously enumerated and with this the phrase is associated, and as "blasting powder" by name is not prohibited upon the premises and falls within the class of prohibited articles only in case the general expression "other explosives" under the circumstances can be said to include it, the court, before passing upon this question, must know the nature of "blasting powder" and any other fact or circumstance showing the intention of the insurer as to the relation of this indefinite phrase to the subject matter
122 of the insurance.

Second. "Blasting powder" not being expressly prohibited upon the premises, the defendant in error was entitled to show the notorious and long established custom in this mining district for tenants to keep "blasting powder" in their houses, in reasonable quantities, for use in the mines, which practice was known to the insurer's agent who collected a premium for this risk, and having established these facts by uncontradicted testimony, the court should have instructed the jury that the keeping of blasting powder upon the premises, as shown in this case, did not forfeit the insurance.

From the record we gather that the plaintiff in error issued a policy of fire insurance to the defendant in error for a term of three years from February 4th, 1904, for Two Thousand Six Hundred Dollars ($2600.00), on a two story frame shingled roofed building, 28 x 96 feet and additions, to be occupied by tenants as dwelling, and situate in Punxsutawney Borough, Jefferson County, Pennsylvania, in the Elk Run addition to the said borough. A premium of Sixty-five Dollars ($65.00) was paid, which was at the rate of two and one-half dollars per hundred, or about double the usual rate.

Among other provisions in this policy, the one important in the determination of this case is as follows:

"This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if * * * the hazard be increased by means within the control or knowledge of the insured * * * or if illuminating gas or vapor be generated in the described building (or adjacent thereto) or used therein, or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fire works, gasoline, greek fire, gun powder, exceeding twenty-five pounds,
123 naptha, nitro-glycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflam-ability than kerosene oil of the United States standard."

On December 7th, 1904 the property thus insured was wholly destroyed by fire. Formal proof of loss, as required by the terms of the policy, was made and forwarded to the plaintiff in error, and

duly received by it. The plaintiff in error refused to pay the amount of the insurance. Suit was brought by the defendant in error in the Circuit Court of the United States for the Western District of Pennsylvania, and defense thereto was made. Among other grounds alleged was the claim that "there was kept, used or allowed on the insured premises blasting powder, or some other explosive differing essentially from gun powder, without any provision allowing the same being provided by agreement endorsed on the policy or added thereto." The defendant in error claimed "other explosives" did not include "blasting powder", and it was so understood by the insurance company, through its agent, when the policy was written, who knew of the custom of keeping "blasting powder" by miners and who collected a premium from the defendant in error for the risk.

At the trial, W. S. Brown, senior member of the firm of Brown Brothers, insurance agents, was called as a witness, and the attorney for the plaintiff made the following offer:

"We propose to prove by the witness on the stand that he is an agent of the St. Paul Fire and Marine Insurance Company, the defendant, and placed the policy on this building that was destroyed; that he knew at the time he placed it that it was a miners' dwelling house, to be occupied by miners; that he has fifteen or twenty years' experience in placing insurance on properties of this class, and that he knows, and knew at the time he placed the risk, that it was the common and ordinary custom for all the miners to keep
124 more or less blasting powder about their premises; that he had that knowledge at the time the risk was placed; and also that the insurance company charged an increased rate on the building insured, solely on the ground that it was rated as a miners' dwelling house."

The trial judge permitted the witness to testify in support of this offer, and his testimony on this point was as follows:

"Q. Had you any knowledge at the time you took this risk who was to occupy the building?

A. Yes; I had the knowledge that it was to be occupied by miners.

Q. How long have you been in the insurance business?

A. Twenty-three years last September.

Q. In what particular region of the State?

A. Through Clarion County and Jefferson County all the while.

Q. Have you covered or taken a large amount of risks as agent for different companies on miners' dwelling houses?

A. Yes; I have had considerable experience for coal companies in our district during that time.

Q. And in inspecting the risks and adjusting losses to properties of that kind, have you frequently visited mining towns?

A. Yes.

Q. What custom prevails among the miners as to having blasting powder on their premises, throughout the regions in which you have placed insurance?

A. Well, it is generally supposed that miners keep blasting powder about their dwellings. I have always understood it in that way.

Q. Don't you know for a fact?

A. Yes; I know it as a fact, that they do keep more or less blasting powder all the time in their dwellings.

Q. Did you have that knowledge at the time you accepted this risk?

A. I certainly had.

Q. Was there any extra premium charged by reason of the fact that this house was a miners' dwelling house?

125 A. Yes; there was.

Q. State what that rate was, and explain fully so that the court and jury will understand it?

A. The minimum annual rate on coal properties given to us by the Underwriters' Association—speaking of dwellings now, coal, property, miners' dwellings—is $.75 per annum. We have the privilege to double that for three years, charge two annual rates for three years, which would be one and a half per cent. Now, this building for occupying was built in seven compartments, so that there were seven families, seven miners' dwellings; the building was built with seven compartments, to be occupied by seven different families, as I found out. I increased the rate because of the occupancy; of the number of occupants; understand, now, we were speaking of rates on miners' dwellings, not on other classes of dwellings; the Underwriters' Association gives us a rate of sixty cents a hundred on a single dwellings, or sixty-five cents a hundred on double dwellings, allowing us to double that rate for three years, making it $1.25 for singles and $1.30 for doubles. Now, when I came to write this risk, I looked the situation over, and I concluded, after some figuring, that I would charge one and a quarter per annum, or two and a half per cent, for three years, $2.50 a hundred for three years, which I did. The building was not finished, and I charged according to the Underwriters' Association, for a finishing permit for thirty days; three dollars and ninety cents, I think, of extra premium for finishing.

Q. As I understand you, in addition to charging a double rate for a miners' dwelling house you added an additional rate because the dwelling house had not been finished?

A. Yes; I added an extra premium. I am compelled to do that by the Underwriters' Association.

126 Q. What was the extra premium that you charged for what you call carpenters' risk on an unfinished building?

A. $3.90; thirty days' carpenters' risk.

Q. Now, in order to get this perfectly clear, had that house been intended to be occupied by some other laborer than a miner, what would have been the rate?

A. Well, that would be pretty hard for me to answer, except in this way. I gave you the minimum rate on a single and a double dwelling. Now, I will give you the minimum rate on an ordinary house occupied by one person, and that would be fifty cents per annum, or one dollar a hundred for three years.

Q. Do you double your regular rate on this class of property by reason of the fact that it is to be occupied by miners, who use more or less blasting powder in this business?

A. I almost double the annual rate on miners' dwellings."

It *as* further established by a great number of witnesses, running back for more than two years, that the universal practice in the mining regions, wherein this property was located, among miners, was to keep blasting powder in their dwelling houses. This general and universal practice was known to the agent of the insurance company who had been placing insurance upon like dwellings, the tenants of which followed a like practice for a great number of years. It was further shown by undisputed evidence that blasting powder is not the same as gun powder, but is an explosive of very much lower degree.

Among other questions properly submitted to the jury, the learned trial Judge submitted the question as to whether, under the facts and evidence proven, blasting powder was included in the term "other explosives." On all questions submitted, the jury found in favor of the defendant in error, and returned a verdict for the amount of the insurance. This submission, among others, was filed as a reason for a new trial. This refusal, an appeal was taken to this court.

127 There are seven assignments of error, which raise only two questions of importance in the determination of this appeal. First, as to whether the learned trial judge was in error in admitting the evidence of witnesses as to the custom, and of W. S. Brown, the agent of the insurance company; and, second, as to whether it was error in the trial judge in refusing to unqualifiedly affirm the company's third point upon which the court was requested to charge the jury. It was as follows:

"If the jury believe from the evidence that the plaintiff or her tenant or tenants kept, used or allowed on the insured premises blasting powder, or other explosives, except gun powder, not exceeding 25 pounds in quantity, the policy there become and remained void, and the plaintiff cannot recover in this case, and the verdict should be for the defendant. A. This point is affirmed, if the jury believe under the evidence that blasting powder was one of the articles prohibited by the clause above quoted."

There is no doubt about the fact that blasting powder to the amount at least of a twenty-five pound keg was kept upon the premises by one of the tenants. Was the keeping of blasting powder by the tenants, in quantities indicated by the evidence, prohibited by the terms of this policy? This question was submitted to the jury by the learned trial judge. The plaintiff in error was not entitled to so favorable a disposition of this question, as the jury should have been instructed that in this case the keeping of blasting powder upon the premises in the quantities and in accordance with the custom, was not a violation of any of the requirements of the policy.

The explosives which the policy says shall not "be kept, used or allowed on the premises" are benzine, benzole, dynamite, ether, fire works, gasoline, greek fire, gun powder, exceeding twenty-five pounds in quantity, naptha, nitro-glycerine, or "other explosives."

This must be held to mean other explosives in the class pre-

128 viously mentioned and of a nature as inflam-able and dangerous as the specified class, but it was not intended by the

parties that "other explosives" should extend to other articles of a much lower explosive power, which in no sense could be classed among those dangerous and highly explosive articles. It is manifest that the lower explosives not named were not intended to be prohibited, because following the words "other explosives," the policy specifies such of a lower explosive quality which are intended to be excluded, to wit: phosphorus or petroleum, or any of the products of petroleum, of greater inflammability than kerosene oil of the United States standard. In other words, the policy specifies a number of violent and dangerous explosives which are prohibited upon the premises, and adds other explosives, meaning other explosives of their nature and kind; and then follows a list of a lower degree of explosive power which the insurer elects to exclude from the premises. These are also specified, but nowhere do we find there is any exclusion of blasting powder.

From an examination of the whole policy, it is very plain that this is the proper interpretation to be given to the expression "other explosives." It was evidently so intended by the insurer, as, in another paragraph, it provides for the extent of its liability where fire ensues from an explosion of any kind, by limiting it to the damage done by fire only. Now, it must have been the understanding of the insurer that as all kinds of explosives were not excluded from the premises, there might be destruction of the property resulting from the explosion, and, in that case, the policy provides that its liability shall only extend to the damages caused by fire only, if fire should ensue. This provision indicates that the plaintiff in error did not expect the premises to be kept from explosives, excepting those particularly specified and those of the same class, and that in case other explosives not excluded from the premises were allowed
129 thereon and an explosion occurred, that the company's liability should only extend to the damage done by fire alone. In accordance with the general rule that provisions relating to forfeiture should, when ambiguous, be so construed as to prevent forfeiture, the courts have, as a rule, construed the condition as to the keeping and use of hazardous articles upon insured premises liberally in favor of the insured whenever there is an ambiguity in such condition. So where the policy was intended to be void if gun powder, phosphorus &c. were kept on the premises, or if camphene, burning fluid &c. were kept for sale, stored or used on the premises in quantities exceeding a barrel at any one time without permission, the condition was construed so as to apply the clause "in quantities exceeding a barrel at any one time" to gun powder, and thus prevent a forfeiture of the policy for the keeping of any less quantity than a barrel on the premises. Phœnix Ins. Co. v. Slaughter, 12 Wallace, 404.

The insurance company writes the policy to suit the conditions of the community in which it takes insurance. It knows the elements of risk which the usage of the community where the policy is taken lays upon the company, and all provisions in the policy which tend to work a forfeiture should, as a matter of justice and public policy, be strictly construed, and the courts of last resort in every jurisdic-

tion, both in England and in this country, have followed this practice of construing the policy strictly so as to prevent a forfeiture? Thus, for instance, though fire works usually contain gun powder, keeping fire works has been held not to be a violation of the clause prohibiting the keeping of gun powder: Tischler v. California F. M. Fire Ins. Co., 66 California, 178.

Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces "other" persons or things, the word "other" will generally be read as "other such like," so that
130 persons or things therein comprised may be read as the same with, and not of a quality superior to or different from those specifically enumerated: Am. & Eng. Ency. of Law, Vol. 21, Page 1012.

The rule of legal construction that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration, and to be construed as including only all other articles of the like nature and quality, is usually applied to statutes giving to certain classes special privileges, and those inflicting a penalty or forfeiture: also to provisions in contracts intended to work a forfeiture: and especially is it rigidly adhered to in insurance agreements containing provisions in which general words follow particular enumerations and are inserted in clauses for the purpose of working a forfeiture of the agreement. This is the rule universally adopted by the courts.

The following cases will illustrate the application of the rule:

The leading English case is Sandiman vs. Breach, 7 Barnwall & Cresswell King Bench Reports, 100, in which the rule known as Lord Tenterden's was announced, and has always since been invoked to define the scope and meaning of general expressions in contracts where hard and unconscionable bargains are to be carried into effect. The Chief Justice held that as carriers of a certain description, mentioned in the Act, to wit: drovers, horse-coursers, wagoners and travelers of a certain description were particularly and specifically mentioned, the words "other person or persons" must be construed to be persons ejusdem generis with those specified, and cannot be used in a sense large enough to include a stage coach driver or owner. The same rule was applied to a contract by the English courts shortly after, in the case of Brooks vs. Lord Kensington, (14th English Ruling cases 723) where Vice Chan-
131 cellor Wood held that the construction of a mortgage was subject to the rule, and applied it in the case.

In the case of Alabama vs. Montague, 117 U. S., 602, the description in a mortgage followed the language of an Act of the Legislature of Alabama, as follows: "On the telegraph line and telegraph offices along the line of the said road belonging to said company; also on the machine shops and all *other property* in the State and in Georgia, Tennessee and Mississippi belonging to said company, also on all coal mines now opened or hereafter to be opened and worked, belonging to said company; also upon all iron or other mineral lands, and all iron manufacturing establishments now in

operation and hereafter to be constructed." Upon an attempt, in a foreclosure proceeding, to seize certain lots in Tennessee belonging to the company, it was held that the words "all other property" were intended to cover property of the company in and about the telegraph offices, machine shops, coal mines, iron mines and manufacturing establishments, and did not include the lots which were not in anyway connected ther-with.

In United States vs. Pounds of Celluloid, 82 Fed. Rep., 627, the Circuit Court of Appeals in the Sixth Circuit, in construing the Custom Administrative Act of June 10th, 1890, Sec. 9, as follows: "that if any owner, importer, consignee, agent or *"other person"* shall make, or attempt to make, a fraudulent entry of goods, such goods shall be forfeited", held that when a forfeiture of merchandise is sought, the words "other person" means some one of the same general class as those described by the preceding words, and hence did not include a stranger who is a mere trespasser in respect to the goods.

The same Judge, in the same Circuit, in the case of Newport &c. Co. vs. United States, 61 Fed. Rep., 488, held, that under the Revised Statutes forbidding interstate carriers of animals to confine them twenty-eight consecutive hours without unloading for
132 rest, water and feeding, unless prevented "by storm or other accidental causes", and imposing a penalty for "knowingly and willingly" failing to comply with this provision, such unloading is excused by unavoidable causes only, and the words "other accidental causes" refer to those that are unavoidable, such as storms, and do not include accident to the train resulting from negligence.

In the case of Crystal Spring Distillery Co. vs. Cox, 49 Fed. Rep., 555, the Revised Statutes abating the tax on distilled spirits destroyed while in a bonded warehouse "by accidental fire or other casualty", the words "other casualities" mean an accidental destruction by some cause of like character and operation as fire, and did not include a loss by warping of barrels from unusual and excessive summer heat.

In Erwin vs. Jersey City, 60 New Jersey Law, 145, Chief Justice Magie, held, that the words "other matters" used in an Act for the government of cities of that State, approved April 6th, 1889, wherein the mayor of the city is given authority to veto the acts of any board of the city, and it is required that copies of all resolutions "and other matters" shall be furnished to the mayor for consideration, that the words "other matters" did not include any matters other than a class of acts usually performed by such bodies by resolutions or ordinances, and that the general words were restricted to such resolutions and ordinances.

In the case of Livermore vs. Freeholders of Camden County, 29 New Jersey Law, 247, the Act provided that is any damage shall happen to any person or persons in his, her, or their team, carriage or "other property" by means of the insufficiency or want of repair of any bridge upon any public road in any township in the state, the person so injured shall have the right to recover damages. Chief Justice held in this case that the words "other property" did not

authorize the recovery of damages to the owner of a grist
133 mill, but the general words were restricted to property of the same kind, as indicated by the specific words.

The words "or other officers" in the Fourteenth Section of the Attachment Act, and the same words whenever they occur in the supplements thereto, passed February 1830, in the State of New Jersey, must be restricted to sheriffs and officers of like kind, and did not include constables. It is enacted by the Fourteenth Section of this Attachment Act, "that if the sheriff or other officer shall, by virtue of any writ of attachment, issued in pursuance of that act, attach, through ignorance &c., any goods, &c. which shall be claimed by any person as his property, it shall and may be lawful for such sheriff or officer to summon and swear a jury to try the right of property. A constable was not included in the words "other officers." Stryker vs. Skillman, 14 N. J. L., 191. See also State vs. Gedicke, 43 N. J. L., 89.

In King vs. Thompson, 87 Pa. St., 369, the language of the Act of 1855 is "whenever any husband for drunkenness, or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a feme sole trader." It was held that the temporary inability of a man to provide for his wife, by reason of sickness, was not such "other cause" as to entitle the wife to become a feme sole trader. The general words referred to causes of the same kind to those specified.

In Renick vs. Boyd, 99 Pa. St., 555, the words "other property", employed in the said Act, were intended to include only articles of the same generic character as those already enumerated, such as slate, marble, iron ore, zinc ore &c., but did not apply to the case of growing crops.

In Pardee's Appeal, 100 Pa. St., 412, Justice Sterrett said, we are clearly of opinion that the business of cutting logs and driving them to the place of manufacture is not such as is contemplated
134 by the Act of 1872. Its declared purpose is to secure money due for labor and services rendered by any miner, mechanic, laborer or clerk, from any person &c. employing clerks * * * or laborers, either as owners, &c., of any works, mines, manufactory or "other business." It is contended that the expression "other business &c." is sufficiently comprehensive to embrace cutting and driving logs. Perhaps it would be, if we were at liberty to construe it without reference to the context; but the preceding words, designating particular branches of business with which the idea of permanency and completeness, in a certain sense, is always associated, must control the meaning of the more general expression used in immediate connection therewith. The "other business" is ejusdem generis with that more particularly described by the preceding words of the context, business of the same general character, not embracing every species of employment in which the service of others may be rendered.

In Bucher vs. Commonwealth, 103 Pa. St., 528, it was held the words "other persons" following in a statute the words "warehouseman and warfinger" must be understood to refer to other persons

ejusdem generis, viz: those who are engaged in a like business or who connect the business of warehouseman &c. with some other pursuit.

These are a few of the cases illustrating the application of the ejusdem generis rule of interpretation of statutes, and is applied, for the same reasons, with like effect in the construction of contracts (Leake on Contracts, 4th Edition, 138), especially in policies of insurance to clauses intended to work a forfeiture against the insured. The use of words and phrases, the scope and extent of which are uncertain and indefinite, is not to be encouraged in contracts, and especially should they be avoided in contracts of insurance in which the law holds both parties equally bound to the provisions of the writing, when, as a matter of fact, as a rule, the insured is either entirely ignorant of all the terms of the policy, or is pos-
135 sessed only of a vague information of their extent and meaning. The insured, notwithstanding, is as a matter of public policy, presumed to know and required to observe every covenant and requirement contained in the policy. The policy is skillfully drawn by the insurer, who is not only presumed to know but who, as a rule, actually does know the existing conditions and uses of the property insured. It is, therefore, no hardship to insist that provisions therein contained, calculated to work a forfeiture, shall be specific and certain, especially should this be required in prohibiting the use of keeping hazardous articles upon the premises, and to allow the use and keeping of such only to work a forfeiture as are expressly prohibited. The fact that a great variety of explosives are constantly used by the people in all walks of life, for various purposes, is the strongest argument against the injustice of construing the catch-all phrase "other explosives" in this policy in the broad and comprehensive sense. The old fashioned gun cap and the head of some matches in every day domestic use are "explosives," and though of such an infinitesimal hazard as to warrant the assumption that they were not to be regarded as included in "other explosives," yet if they are not to be included in "other explosives", of what degree of hazard and difference of explosive force shall indicate where the line shall be drawn, if we stop short of insisting that "other explosives" shall mean explosives of a like kind, nature and hazard of those particularly specified. And why not insist upon this rule of interpretation? The insurer writes the policy, and it is a very simple matter to prohibit the use of an article on the premises by name and by use of general words, all of its class and kind.

The evidence shows that it has been the custom and usage among the miners in the coal mining district of Pennsylvania to keep blasting powder upon the premises. The Act of 1893 of this State pre-
136 vents these workmen from taking quantities of this powder in the mines, and in order that they may continue in the work of coal mining, it is necessary for them to have a safe and dry place to keep their powder. These industrial conditions necessitated the practice of keeping small quantities of blasting powder upon miners' premises, which has long since grown into a cus-

tom. Neither the practice nor the existence of the custom is disputed by the insurance company.

The company's agent who took this insurance has lived in the mining district for upward of twenty-three years: he has represented this insurance company for more than six years, and for which company he has been insuring miners' tenements in this vicinity. The plaintiff in error not only did not attempt to produce evidence to contradict the proof of this universal habit of keeping blasting powder upon the premises, but did not even cross-examine the numerous witnesses called to establish the fact and the defendant in error showed by the company's agent that he, in this case, actually charged and collected from Mrs. Penman a rate nearly double the usual rate for tenement house insurance, and that the extra amount collected was to compensate the insurance company for the additional risk it was to assume in insuring the property against the risk of keeping blasting powder on the premises.

With this knowledge of a hazard, for which the company was paid to assume and which had grown into a custom long known to its agents, against which it could have so easily protected itself in its policy by inserting the words "blasting powder", if it intended to exclude it, it has no just ground whatever for now insisting upon forfeiting the policy upon an indefinite and general use of terms. There can be no other view, however, than that blasting powder was never intended to be covered by the expression "other explosives".

137 The property here insured was located in the State of Pennsylvania. The policy was made and delivered here where the contract is to be performed. It is, therefore, a Pennsylvania contract, and to be interpreted by the laws of this State. (9 Cyc. 582; See Note 63 L. R. A., 856) which laws, however, so far as applicable to the facts of this case, do not differ from the law as found in the text books and decisions of courts of last resort in other jurisdictions.

Insurance against fire was the primary purpose of the contract, and in the construction of general terms the question may be whether the words used should be taken in a comprehensive or restricted sense; in a general or a particular sense; in the popular and common, or in some unusual and peculiar sense: Parsons on Contracts (6th Ed.), Sec. 501.

"Rules of construction were framed with a view to general results, but they are sometimes productive of injustice by leading to results contrary to the intention of the parties; and the recent tendency is to pay less attention to any such rule and more to all admissible indications of what the intention actually was in the case in hand, including the practical construction of the contract by the conduct of the parties themselves." Wald's Pollock on Contracts, 3rd Ed., 318.

"The construction of a contract in writing, as of all written instruments, belongs to the court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched and the surrounding circumstances, if any, have been ascertained as facts: and it is the duty of the jury to take the

onstruction from the court; either absolutely, if there be no words
o be construed, as words of art or phrases used in commerce, and no
urrounding circumstances to be ascertained; or conditionally, when
hese words or circumstances are necessarily referred to them."
Leake on Contracts, 4th Ed., 142.

38 "Customary incidents universally attaching to the subject matter of the contract in the place where the contract was made are impliedly annexed to the written terms of the contract, unless the custom is expressly excluded. Parol evidence of custom, consequently, is always admissible to explain the real meaning of the parties, but not to prevail over and nullify the express provisions of the contract. The evidence of usage must, however, be distinct, in order to affect the meaning of the terms of the contract, and not to be inconsistent therewith. The principle on which the evidence is admitted is that the parties have set *down* in writing those only of the terms of the contract which were necessary to be determined in the particular case, leaving to implication all those general incidents which a uniform usage would annex, and according to which they must be considered to contract, unless they expressly exclude them. Whether the terms of the contract are such as to exclude evidence of the custom is a question for the Judge and not for the jury." Addison's Law of Contracts, 10th Ed., 64-65.

"It has repeatedly been held that a breach of a printed condition of a policy against the keeping of certain substances does not preclude recovery when the subject-matter insured was known to the insurer to be such that the use of these substances was a necessary and usual incident of the business, provided that the substances be kept only in such quantities and used only in such manner as was necessary and usual." 19 Cyc. 737. This rule applies to dwelling houses. McKeesport Machine Co., vs. Ben. Franklin Ins. Co., 173 Pa. St., 57, and cases there cited: Lutz vs. Insurance Co., 205 Pa. St., 159.

Coming now to the Pennsylvania cases, it is found that they amply sustain the contention of the defendant in error that in this case it was proper to introduce evidence to determine the subject matter of the insurance as affected by the surrounding facts and cir-

39 cumstances of the making of the contract, and to show the custom prevailing in connection with the uses for which the insured property was occupied: the knowledge of the insurer of this custom at and before the time the policy was executed, and the fact that the insurance company was paid for the risk involved in the custom or usage of tenants keeping blasting powder upon the premises. Graybill vs. Fire Ins. Co., 170 Pa. St., 75; Lutz vs. Insurance Co., supra.

Justice Williams, in 1896, in a well considered case, McKeesport Machine Co., vs. Ben Franklin Ins. Co., supra, said: "An insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used. Pipe Line vs. Ins. Co., 145 Pa. St., 346. The rule is not limited to insurance upon property in use for manufacturing or other business pur-

poses. It was applied in the construction of a policy issued upon
dwelling house in Doud vs. Citizens' Insurance Company, 141 P
St., 47, and in Roe vs. Dwelling House Insurance Co., 149 U. S., 9
It was applied to a policy of insurance upon a horse in Haws vs. F
Association of Phila., 114 Pa. St., 431. Still another rule of co
struction is that the circumstances surrounding the making of t
contract and effecting the subject to which it relates form a sort
context that may properly be resorted to for aid in determining t
meaning of the words and provisions of the contract. Bole, Assigne
vs. New Hampshire Fire Ins. Co., 159 Pa., 53; Graybill vs. T
Penn Township Mutual Fire Ins. Co., 170 Pa., 75."

In this case, that is, Machine Co. vs. Ben Franklin Ins. Co., supr
the insurance was upon two buildings, a "pattern shop", and t
other a "foundry and machine shop". The policy covered the enti
plant, to wit, both buildings and their contents. The fire a
140 fected only the foundry and the machine shop and what w
within at the time the fire took place, but this included certa
patterns then in actual use in the ordinary course of plaintiff's bu
ness, but which were described in the policy as in the pattern sh
where they were kept when not in use. As the pattern shop was n
involved in the fire the insurance company denied its liability f
loss of the patterns because by the terms of the policy the undertak
ing of the insurer was stated as an undertaking to insure the proper
real and personal described in it "while located and contained
described herein and not *elsewhere*."

Upon the well recognized principle that the insurer is held
know the custom and usages of the business plant upon which
places the insurance, it was held that the company was liable for t
insurance notwithstanding the fact that they were burned "whi
located elsewhere", but located where the usages and customs of t
plant or business to which they belonged placed them.

The Judge further said, "If this insurance was upon a going m
of factory in which the tools, machinery and patterns were in regul
and continuous use for the purposes of the business of the owners, t
contract of insurance must be construed in the light of that fa
liberally, in aid of the insured. It was not an insurance upon th
goods in store, in terms, and unless it becomes so in the light of th
facts appearing in the evidence, there is no legal reason that we ca
see why the plaintiff should be held to be concluded by words th
could not have been intended to apply to a business in actual pro
ress, and that ought not to be so construed even if the insurer i
tended to escape from the obligation assumed by the policy. It woul
enable an insurer after receiving the money of the manufactur
for an insurance upon his business appliances, to say to him in effe
'Close your factory of forfeit the money you have paid us. T
141 secure the benefit of your policy, you must leave everythi
unmoved.' Nothing short of a stipulation of this sort i
corporated into the policy in words capable of no other constructio
could induce us to aid in the perpetration of such injustice."

Equally pointed is the language used in Snyder vs. Ins. Co., 7
N. J. L., 549, illustrating the tendency of all courts to uphold

policy of insurance and construe words intended to work a forfeiture most strongly against the insurer and never permit them to extend beyond the strictest construction which may reasonably be put upon them, for the very good reason stated by Depue, Justice, "If the terms used are imperfect it is the fault of the defendants, it is their contract and the construction of it must be most strongly against them. There was a kerosene oil stove in the shed which was on the premises. The oil stove was used for cooking. The fire broke out in close proximity to the stove. The lamp in the stove was then burning, but the fire was not caused by an explosion. The policy contains a provision that it should be void if "there be kept, used or allowed on the above-described premises, naptha or petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard (which last may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by day-light). The contention is that the policy, by force of the above provision, was avoided by the use of kerosene otherwise than in lamps for illuminating purposes. The result of this contention depends upon the construction and effect of the clause the policy above set out. It is a settled rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeiture will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy. Carson vs. Jersey City Insurance Co., supra. In Stone's Administrators vs. United States Casualty Co., 5 Vroom, 471, Chief Justice Beasley said: "'A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of the endorsement will bear no other rational interpretation. If the terms used are imperfect, it is the fault of the defendants. It is their contract, and the construction of it must be most strongly against them.' The principal member of this clause, 'if there be kept, used or allowed on the above-described premises * * * petroleum or any of its products of equal or greater inflammability than kerosene oil of legal standard,' is not broken by the use made of kerosene in this instance. The defence rests upon the other member of the sentence which is enclosed in brackets, viz: 'which last (i. e., kerosene oil of legal standard) may be used for lights only, provided the oil be drawn and the lamps be trimmed and filled solely by daylight'. This member of the sentence imports a regulation of the use of kerosene oil when used for lighting purposes, and the words used are capable of a construction which would give to it no other effect. If the insurer intended to prohibit the use of kerosene for any other purpose than for light, it would have been easy to so express the prohibition in its policies. Policies of insurance against fire are taken out by all classes of persons, educated and uneducated, and no rule of law is more salutary than that conditions in these instruments, expressed in terms ambiguous and capable of misleading, shall not be allowed to avoid the contract. The member of the sentence within the brackets, to say the least, is confusing and ambiguous when taken in connection with the words which pre-

cede it, and should not be allowed to make void this policy under the circumstances of this case."

In Machine Company vs. Ben Franklin Ins. Co., supra, evidence was admitted to show the circumstances surrounding the making of the contract of insurance and affecting the subject to
143 which it related, and upon proof of the usages of the business the insurance company was held to insure subject to them.

Even more unjust is the position assumed by this company who knew of the custom through its agent at the time and long prior to the taking of this insurance, and with this knowledge actually collected a premium for the risk of tenants following the usual custom of keeping blasting powder upon the premises, and now, when called upon to pay for the loss resulting from fire caused by the risk for which it was compensated, it endeavors to escape its liability upon a broad and liberal construction of a catch-all phrase, which it urges upon the court should be extended to include the very explosive it knew it was customary to use upon the premises when it insured the property and against the hazard of which it collected a premium. Nothing short of an express prohibition of the keeping or using of blasting powder by name upon the premises should induce the court to permit this company to escape a just liability. The knowledge of the insurance agent in charge of this district of the conditions existing at the date of the insurance is the knowledge of the company itself. The Peoples Ins. Co. vs. Spencer & McKay, 53 Pa. St., 353; Humphrey vs. National Association, 139 Pa. St., 264; Note Vol. 1 L. R. A., 218.

Following are other cases which sustain the claim of the plaintiff below, that the insurance company is chargeable with knowledge of customary usages of the tenants in dwelling houses, and that evidence is admissible to show such customs and usages at the time of the execution of the contract of insurance: Philadelphia Tool Co. vs. British American Ins. Co., 132 Pa. St. 236; Caldwell Adm. vs. Fire Asso. of Phila., 177 Pa. St., 492; Humphrey vs. National Benefit Asso., 139 Pa. St., 264; Lutz vs. Insurance Co., 205 Pa. St., 163; Springfield F. & M. Ins. Co. vs. Wade, 58 L. R. A., 714;
144 Smith vs. German Ins. Co., 30 L. R. A., 368; Faust vs. American F. Ins. Co., 30 L. R. A., 783; Maril vs. Conn F. Ins. Co., 30 L. R. A., 835; Yoch vs. Home Ins. Co., 30 L. R. A., 857.

(Indorsed.) Dissenting Opinion, by Holland, J. Filed. February 25, 1907.

145 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1906.

No. 54.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff in Error,
v.
ANNIE E. PENMAN, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause, be, and the same is hereby reversed with costs.

GEO. GRAY,
Circuit Judge.

Entered and filed, February 28th, 1907.

146 Filed March 25, 1907.

In the United States Circuit Court of Appeals, Third Circuit.

No. 54. October Term, 1906.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff in Error,
vs.
Mrs. ANNIE E. PENMAN, Defendant in Error.

Petition for Rehearing.

To the Honorable the Judges of the United States Circuit Court of Appeals in and for the Third Circuit:

Mrs. Annie E. Penman, Defendant in Error and Petitioner, respectfully requests a re-hearing in the above entitled cause decided February 26, 1907, by the Honorable Judges Gray and Lanning, a dissenting opinion being filed by Judge Holland. Your petitioner presents the following reasons for a re-argument:

First. Your petitioner respectfully contends that the policy in suit is a Pennsylvania contract, and that by invoking three prin-
147 ciples of law that are uniformly ruled in that State, the judgment obtained by her in the Circuit Court should stand, viz:

(*a*) Where the terms of a policy of insurance are susceptible without violence of two interpretations, the construction which is most favorable to the insured to indemnify her from loss sustained should be adopted.

(*b*) Where the storage or use of blasting powder was not prohibited in terms, it was a question of fact for the jury whether it came within the description of "other explosives," and in the absence of proof it is not a matter of which the Court will take judicial notice.

(*c*) A parol waiver by an agent of the insurer of a condition of the policy is binding on the insurer notwithstanding a provision in the policy that an agent can make such waiver only by writing endorsed upon the policy.

With respect and courtesy to your Honorable Court your petitioner suggests that these principles should resolve the original verdict in her favor.

Second. The majority opinion of the Court neither affirms nor denies the position of the defendant in error, namely, that if blasting powder was a lower degree of explosive or less dangerous than any of the prohibited substances specifically named in the policy, that it was not included in the general words "other explosives," but reasons that the burden was on the defendant in error to show that blasting powder was of lower explosive power and less dangerous than each of the prohibited articles named therein, and in the absence of such proof the general words "other explosives" included blasting powder. Your petitioner respectfully contends that this is a shifting of the burden of proof contrary to all precedents. The affidavit of defence filed by the plaintiff in error denies its liability on the policy on the ground that "there was kept, used or al-
148 lowed on the insured premises blasting powder or some other explosive differing essentially from gunpowder, without any provision allowing the same having been provided by agreement endorsed on the policy or added thereto." The burden was therefore on the affiant to prove the allegation set up in the affidavit of defence. Especially is this true when the purpose of the proof is to work a forfeiture of the contract. The affidavit of defense limits the comparison of blasting powder to one prohibited article named in the policy, to-wit, gunpowder. It therefore conceded that blasting powder was not, as to explosive power and danger, in the class of any of the prohibited articles named except that of gunpowder, and as the terms of the policy permitted the storage of twenty-five pounds of gunpowder, they assumed the burden of the allegation that it differed essentially from gunpowder. The affidavit of defence recognized the construction contended for by the defendant in error when it designated gunpowder as the class of explosives to which blasting powder belonged, and when it alleged that it differed essentially from gunpowder. The issue was formed by the pleadings, and not one word of proof was offered by the plaintiff in error to establish its allegation that blasting powder differed essentially from gunpowder. If the burden shifted from the plaintiff in error to the defendant in error, it was squarely met when your petitioner offered evidence to show the essential difference between blasting powder and gunpowder, the only issue raised by the affidavit of defence.

Third. The contract of insurance did not prohibit the agent from accepting a risk wherein the prohibited articles were kept, used or allowed on the premises. It provided that if he did accept the risk he

should endorse thereon or attach thereto an agreement to that effect,
and it is further stated therein that in the absence of such en-
149 endorsement it shall be held that such provisions or condi-
tions were not waived by the insurer. If the words "other explosives" included blasting powder, bearing in mind that the insured is entitled to a liberal construction of the contract and that the agent was equal in power to the principal in this case, then he made one of two mistakes in making this contract of insurance, namely: in misinterpreting his own contract in that he believed its terms did not bar the storage of blasting powder, or if it did bar the storage of blasting powder he neglected to make the endorsement on the policy as required by the contract. Your petitioner respectfully contends that it was a common custom of the proposed tenants of the premises insured to keep blasting powder in their dwelling house, that both the insured and the insurer had knowledge of this fact, and that the agent recognized it as an increased hazard which he had the power to accept under the terms of the contract and charged a higher or double rate by reason of this condition. Parol testimony was admissible to show these facts, and the mere fact that the agent misinterpreted the terms of the policy or failed to put the endorsement thereon, after charging an extra premium for a risk that he has the power to accept, does not forfeit the policy. Such a principle as allowing an insurance company to take advantage of its own mistake or negligence would be contrary to all precedent.

Fourth. Your petitioner respectfully contends that the assumption in the majority opinion that the words "or other explosives" included blasting powder, or that "benzine, benzole, ether, fire works, gasoline, Greek fire, naphtha, and nitro glycerine are explosives of lower power than dynamite or gunpowder, or even than blasting powder," is taking judicial notice of these facts in the absence of proof and putting a burden on the defendants in error which was not raised
by the pleadings. Even if it had been raised the petitioner
150 contends that the burden of proof never shifts, and it was the
duty of the plaintiff in error to produce evidence to establish the fact that blasting powder came within the description of these prohibited articles. Notwithstanding the fact that no proof of this character was offered by the plaintiff in error, the defendant in error did produce evidence on the trial of the cause to show that blasting powder did not fall within the prohibited class of gunpowder, the only standard of comparison raised by the affidavit of defence.

Wherefore your petitioner believes that great injustice has been done her, and that a reconsideration of the case together with the principles of law herein suggested will result in substantial justice being done to all parties concerned, and humbly prays your Honorable Court to grant a re-argument of this cause. And your petitioner will ever pray, etc.

Respectfully submitted.

MRS. ANNIE E. PENMAN.
Petitioner.

By A. J. TRUITT.
B. M. CLARK.
Attorneys for Defendant in Error.

We, A. J. Truitt and B. M. Clark, Attorneys for Mrs. Annie E. Penman, Defendant in Error and Petitioner, do hereby certify that in our judgment the foregoing petition for re-hearing is well founded and that the same is not interposed for delay.

A. J. TRUITT,
B. M. CLARK,
Attorneys for Defendant in Error.

151 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1906.

No. 54.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Plaintiff in Error,
v.
ANNIE E. PENMAN, Defendant in Error.

Per Curiam.—The petition for a rehearing of this case presents no matter that has not already been fully considered by the Court. No reason is perceived why the re-hearing should be allowed. The petition will therefore be denied, and it is so ordered.

(Indorsed.) United States Circuit Court of Appeals. Third Circuit. St. Paul Fire and Marine Insurance Company, Plaintiff in Error, v. Annie E. Penman, Defendant in Error. Entered and filed, April 11, 1907.

152 UNITED STATES OF AMERICA, *set:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify that the foregoing pages from one to one hundred and fifty-one, inclusive *to* contain a full, true, complete and faithful copy of the original transcript of record in the case of St. Paul Fire and Marine Insurance Company, plaintiff in error, against Annie E. Penman, defendant in error, on file and now remaining among the records of the said court in my office.

In Testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia this twenty-seventh day of April, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-first.

[Seal United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk United States Circuit Court of Appeals, Third Circuit.

153 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America, To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which St. Paul Fire & Marine Insurance Company is plaintiff in error, and Mrs. Annie E. Penman is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
154 into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act therein as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of March, in the year of our Lord one thousand nine hundred and eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

155 [Endorsed:] File No. 21,001. Supreme Court of the United States. No. 598. October Term, 1907. Mrs. Annie E. Penman, vs. St. Paul Fire & Marine Insurance Co. Writ of Certiorari.

156 In the United States Circuit Court of Appeals for the Third Circuit.

ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff in Error,
vs.
ANNIE E. PENMAN, Defendant in Error.

Stipulation.

Whereas the Supreme Court of the United States has issued, under date of March 5, 1908, to the Honorable the Judges of the United States Circuit Court of Appeals for the 3d Circuit a writ of certiorari commanding said Judges to send, without delay, to said Supreme Court of the United States the record and proceedings in the above entitled cause,

Now, therefore, it is hereby stipulated by and between the attorneys of record for the respective parties above-named that the certified transcript of record heretofore filed in the Clerk's office of the Supreme Court of the United States on the petition for said

writ of certiorari shall be taken as having been filed on the re
to said writ.

W. K. JENNINGS.
D. C. JENNINGS.
Attorneys for the Plaintiff in Erro
B. M. CLARK.
A. T. TRUITT.
Attorneys for the Defendant in Erro

Mar. 21, 190

(Indorsed.) In the U. S. Circuit Court of Appeals for the T
Circuit. St. Paul Fire & Marine Ins. Co., Plaintiff in Erro
Annie E. Penman, Defendant in Error. Stipulation. Filed M
30, 1908. Wm. H. Merrick, Clerk.

157 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, William H. Merrick, Clerk of the United States Circuit Cou
Appeals for the Third Circuit, by virtue of the foregoing Wr
Certiorari and in obedience thereto do hereby certify to the sup
court of the United States the consent of the Counsel for the
spective parties thereto annexed as my return to said writ.

In Testimony Whereof, I have hereunto subscribed my name
affixed the seal of the said Court, at Philadelphia, this thirty
day of March in the year of our Lord one thousand nine hun
and eight and of the Independence of the United States the
hundred and thirty-second.

[Seal United States Circuit Court of Appeals, Third Circuit

WM. H. MERRICK.
Clerk U. S. Circuit Court of Appeals, Third Circu

[Endorsed:] No. —. Term, 190-. United States Circuit Cou
Appeals, Third Circuit. Certified Copy.

158 [Endorsed:] File No. 21,001. Supreme Court U. S. O
ber Term, 1909. Term No. 67. Mrs. Annie E. Penman, P
tioner, vs. St. Paul Fire & Marine Insurance Co. Writ of Certi
and return. Filed April 1st, 1908.

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~565~~ 67 TERM, 1908.

Mrs. Annie E. Penman,

Plaintiff in Error and Petitioner,

vs.

St. Paul Fire & Marine Insurance Company,

Defendant in Error and Respondent.

PETITION and BRIEF

On Petition for Certiorari to the Circuit Court of Appeals for the Third Circuit.

FREDERIC D. McKENNEY,
A. J. TRUITT,
B. M. CLARK,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

MRS. ANNIE E. PENMAN, Petitioner, AGAINST ST. PAUL FIRE & MARINE INSURANCE COMPANY, Respondent.	October Term, 1908.

Petition for Writ of Certiorari.

Requiring the Circuit Court of Appeals, for the Third Circuit to certify to the Supreme Court for its review and determination the case of St. Paul Fire & Marine Insurance Company, Plaintiff in Error, against Mrs. Annie E. Penman, Defendant in Error.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

The petition of Mrs. Annie E. Penman shows to this Honorable Court, as follows:

FIRST: That your petitioner, a resident and citizen of Jefferson County, Pennsylvania, entered into a contract on the fourth day of February, A. D. 1904, with the respondent, the Saint Paul Fire and Marine Insurance Company, a corporation existing under and by virtue of the laws of the State of Minnesota, whereby and wherein the insurance company in consideration of Sixty-five ($65) Dollars premium, paid by the petitioner to the respondent, insured the petitioner for the term of three years from the fourth day of February, A. D., 1904, at noon, to the fourth day of February, A. D. 1907, at noon, against all direct loss or damage by fire to an amount not exceeding Twenty-six Hundred ($2,600) Dollars on a certain two story, frame, shingled roof building 28 feet by 96 feet and additions, to be occupied by tenants as dwellings, in Elk Run Addition to Punxsutawney Borough, Jefferson County, Pennsylvania.

SECOND: That said respondent was conducting a general fire insurance business as a foreign corporation in the State of Pennsylvania and had appointed Messrs. Brown Brothers as its Agents to solicit insurance, make, countersign and deliver contracts of insurance and receive and accept premiums for the same; that said agents maintained an office in the Borough of Punxsutawney, County of Jefferson and State of Pennsylvania, at which place the contract of insurance involved in this controversy was procured, made and delivered to the petitioner. The payment of the premium was made to Brown Brothers at their office and remitted in due course of time, and accepted by the respondent.

THIRD: That on December 7, 1904, the insured premises was totally destroyed by fire and after proofs of loss had been properly furnished to the respondent and its refusal to pay the loss, your petitioner brought an action of Assumpsit on said contract in the Court of Com-

mon Pleas of Jefferson County, Pennsylvania, on the 26th day of May, A. D. 1905. A summons was issued, served and appearance entered by the respondent. A petition was subsequently presented by it to the Court of Common Pleas of Jefferson County, Pennsylvania, praying, inter alia, that an order be made removing the cause to the Circuit Court of the United States for the Western District of Pennsylvania, alleging that said last mentioned Court had jurisdiction thereof by reason of the petitioner being a citizen and resident of the State of Pennsylvania and that the respondent was a non-resident of said state, and subsequently on June 22, 1905, the Honorable Judge of the Court of Common Pleas of Jefferson County, Pennsylvania directed the cause to be removed to the said Circuit Court of the United States for the Western District of Pennsylvania in accordance with the prayer of the respondent and the Act of Congress in such case made and provided.

FOURTH. After said cause was removed to the said Circuit Court of the United States for the Western District of Pennsylvania, the respondent filed an affidavit of defense denying its liability on said insurance policy on the ground that said policy had been forfeited, and therein averring that they had a full and legal defense to the whole of your petitioner's claim on three grounds, to-wit:

"1. The policy in suit contains the following "clause, inter alia:

"'This entire policy unless otherwise provided "by agreement indorsed thereon or added hereto "shall be void * * * if (any usage or custom of trade "or manufacture to the contrary notwithstanding) "there be kept, used or allowed on the above de-"scribed premises benzine, benzole, dynamite, ether, "Greek works, gasoline, Greek fire, gunpowder, exceed-"ing 25 lbs., in quantity, naphtha, nitro-glycerine "or other explosives.'

"Deponent is informed and believes and expects "to be able to prove upon the trial of this cause, "that at and immediately before the occurrence of "the fire, which is alleged in the statement of "claim to have taken place on the evening of De- "cember 7th, 1904, there was kept, used or allow- "ed on the insured premises blasting powder or "some other explosive differing essentially from "gunpowder, without any provision allowing the "same being provided by agreement indorsed on "the policy or added thereto.

"2. Said policy also provides that,

"'This company shall not be liable for loss "caused directly or indirectly by invasion, * * * or "(unless fire ensues and in that event for the dam- "age by fire alone) by explosion of any kind.' Al- "so 'If a building or any part thereof fall, ex- "cept as the result of fire, all insurance by this "policy on such building, or its contents, shall im- "mediately cease.'

"Deponent is informed and believes and expects "to be able to prove upon the trial of this cause, "that immediately preceding the fire above men- "tioned, by which the building insured was alleged "to have been destroyed in the statement of claim; "the explosive above mentioned by some means was "ignited and a violent explosion ensued, wrecking "the insured building, blowing the roof off and "causing the same to fall outside thereof, so that "there was nothing left but a wreck to be con- "sumed by the fire that ensued; and deponent is "advised that the company is not liable for the "the loss and damage thereby occasioned:

"1. Because all the damage was done prac- "tically by the explosion.

"2. Because the insurance immediately ceased "upon the fall of the roof and the side of the build- "ing which preceded the fire.

"3. It is also provided that said policy shall "be void 'if any change other than the death of an "insured take place in the interest, title or pos- "session of the subject of insurance (except change "of occupants without increase of hazard) whether "by legal process or judgment, or by voluntary act "of the insured or otherwise.' Deponent has been

"informed that before the fire the plaintiff sold or
"exchanged the insured property and conveyed the
"same either by a written agreement or by a deed
"but he has been unable to verify this statement
"for the reason that no conveyance has been placed
"of record."

On September 27, 1905, the respondent pleaded non-assumpsit.

FIFTH. The contract of insurance also contained the following:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon, or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, as to such provisions and conditions no officer, agent or representative shall have such power, or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

SIXTH. That on December 7, 1905, the parties went to trial in the Circuit Court of the United States in and for the Western District of Pennsylvania, before the Honorable Joseph Buffington, Presiding Judge, and on December 8, 1905, the jury returned a verdict for the plaintiff in the sum of Two Thousand Seven Hundred and Fifty-six ($2,756) Dollars.

SEVENTH. At the trial of the case it appeared by the evidence offered by the respondent: That the house

wa s occupied by tenants who were engaged in the occupation of mining coal at Elk Run Shaft in the Borough of Punxsutawney, Jefferson County, Pennsylvania, and that two or three cans of blasting powder were kept in said houses, and that all of these cans had been opened and a portion of the powder used—*the amount remaining therein was unknown;* that one of the occupants of said building accidentally threw a lighted squib into one of these cans containing powder, and thereupon an explosion took place, followed by a fire which destroyed the insured premises.

EIGHTH. *No evidence was produced by the respondent at the trial of the case showing or tending to show that blasting powder was the equivalent or greater, in inflammability, power or danger, than gunpowder or any other prohibited explosive enumerated in the policy; and no evidence was produced by respondent showing a change of title to the insured premises.*

NINTH. That it appeared by the evidence offered on the part of your petitioner that blasting powder was a lower degree of explosive than gun powder, that the said insured premises were located in the Bituminous coal region of Western Pennsylvania, and that the powder used in that region was the common ordinary blasting powder; and that it was customary for all miners to keep cans of blasting powder in their houses, and that such custom was and had been a well known fact throughout the mining region of Western Pennsylvania, and that the laws of Pennsylvania prohibited the taking of blasting powder into the mines except in small quantities, and that therefore it became necessary for each miner to keep his blasting powder in his dwelling house; that the explosion did no material damage of itself to the building; that the house was not wrecked nor did it fall down from the result of the explosion; that at the time the fire start-

ed the building was intact; that the agent of the respondent who lived at Punxsutawney, Pennsylvania, in the mining region and had years of experience in insuring this class of property, knew at the time he placed the insurance on said premises that it was to be occupied by tenants whose occupation was mining, and that he further knew there would be kept in this house blasting powder, and that by reason of the increased hazard he charged an extra premium, and that thereafter a special agent of the respondent came and inspected the risk, and stated that he was satisfied and thereby approved the same.

TENTH. At the close of the testimony your petitioner asked the court to direct the jury to return a verdict in her favor on the following ground:

That inasmuch as the storage or use of blasting powder was not specifically prohibited under the terms of the policy; and that no evidence being produced to show that it was the same kind and character of explosive as those which were specifically prohibited by the terms of the policy, that it was, therefore, not included in the words, "other explosives."

ELEVENTH. The respondent likewise asked for binding instructions on the ground that the keeping of blasting powder on the insured premises forfeited the contract.

TWELFTH. The court refused to give binding instructions and submitted the case to the jury and, among other things, said in his charge:

> "Now, gentlemen, it is alleged that blasting powder was included among these articles by the term "'or other explosives'. Ordinarily it is the duty "of a Court to construe a written instrument and "instruct the jury what the terms mean. But "in this case, under the facts and the proofs here,

"bearing in mind the words of the policy and the "testimony of Mr. Brown in reference to this prop- "erty being used as a miner's house, and the tes- "timony that the miners are in the habit of keep- "ing blasting powder on the premises, and also the "testimony in regard to the fact that an extra "charge (if such be the case) was made in this "case by reason of the fact that it was a miner's "residence, we have decided to leave to you, as a "question of fact for you to determine, whether, "under the evidence and the facts proven here, "blasting powder is included in the term 'other "explosives'. In other words, whether it was the "intention of the Insurance Company, when it "issued this policy through Mr. Brown, to provide "therein that if blasting powder was kept, used or "allowed on this premises, the policy was to be "void, and of no effect.

"If you find, gentlemen, under the evidence in "the case, that the term 'blasting powder' was not "included as one of the excepted articles under this "policy, it then becomes your duty to inquire fur- "ther in the case. If you find it was, and that it "was one of the prohibited articles in this policy, "then, unfortunately as may be the situation for "the plaintiff in this case, she is not entitled to re- "cover, because the rights of the parties must be "founded on their contract rights, and not on sym- "pathy or good will or feelings of kindness to- "wards people who have suffered a loss of this "kind.

"If you determine that question, that blasting "powder was not one of the prohibited articles, we "then pass on to consider the next question. The "company says that this loss was caused by an "explosion. And we turn to the policy to see "what the effect of an explosion is. The policy "provides that the company shall not be liable for "thus and so, or unless fire ensues, and, in that "event, for the damage done by the fire only, and "not that done by the explosion. If there was "an explosion in this case, and a fire ensued as the

"result of that explosion, the company is not liable "for the damage that was done by the explosion, "but only for the damage which was caused by the "fire which ensued after the explosion. It will "be for you to determine that fact whether there "was an explosion here, and if so, you will only "charge the defendant, in case you find in favor of "the plaintiff, for the loss that was occasioned by "the fire after the explosion, and not for the dam- "age that was done to the property by the ex- "plosion itself."

THIRTEENTH. On April 9, 1906, the assignments of error, and petition for writ of error and an order allowing same, appeal and order approving same, and citation were filed, and thereby the said cause was removed to the United States Circuit Court of Appeals of the Third Circuit; and afterwards, to-wit, on December 12, 1906, this cause was called for argument in said Court before Honorable George Gray, Circuit Judge, and Honorable James B. Holland and Honorable William M. Lanning, District Judges, and after argument and consideration thereof, the said Court did on the 25th day of February, A. D. 1907, in an opinion written by Judge Lanning and concurred in by Judge Gray reverse the judgment of the Circuit Court, Judge Holland therein filing a dissenting opinion.

FOURTEENTH. On the 25th day of March, A. D. 1907, your petitioner prayed for a re-hearing in the United States Circuit Court of Appeals for the Third Circuit, which was denied by said Court.

FIFTEENTH. Judge Lanning, as an abstract proposition, expressed no opinion on the question whether or not blasting powder was included within the terms of the policy, if it was as a matter of fact an explosive of a lower degree than any other of the explosives named and

prohibited by the terms of the policy, but held that the words "other explosives" in their literal and natural meaning included blasting powder and that the burden was on the insured to show that blasting powder was a less dangerous explosive than each and every other explosive specifically enumerated and prohibitd under the terms of the policy, and that in the absence of proof to that effect the general words "other explosives" therefore included blasting powder. His ruling thereon reads as follows:

> "If its explosive power is of a lower degree than "that of any of the substances specifically named, "and if, for that reason, it is not *ejusdem generis* "with the substances specifically named (a point on "which no opinion is expressed), then, since the "general words in their literal and natural mean- "ing include blasting powder, the burden was on "insured to show its lower explosive power. To "hold, under the present proofs, that the general "words 'or other explosives' do not include blast- "ing powder merely because it is a less dangerous "explosive than dynamite or gunpowder, when it "may be more dangerous than Greek fire, benzine, "benzole, ether, gasoline, or naptha, is virtually to "decide arbitrarily that no meaning or effect shall "be given to the general words. We are satisfied "that this cannot be done, and that, as the proofs "stand, the general words include blasting pow- "der."

SIXTEENTH. On this same proposition, Judge Holland (supported by numerous authorities quoted therein) in his opinion dissenting from the majority opinion, said:

> "The explosives which the policy says shall not "'be kept, used or allowed on the premises' are "benzine, benzole, dynamite, ether, fire works, gas-

"oline, Greek fire, gun powder, exceeding twenty-
"five pounds in quantity, naptha, nitro-glycerine, or
"'other explosives'. This must be held to mean
"other explosives in the class previously mentioned
"and of a nature as inflammable and dangerous as
"the specified class, but it was not intended by the
"parties that 'other explosives' should extend to
"other articles of a much lower explosive power
"which in no sense could be classed among those
"dangerous and highly explosive articles. It is
"manifest that the lower explosives not named were
"not intended to be prohibited, because following
"the words 'other explosives', the policy specifies
"such of a lower explosive quality which are in-
"tended to be excluded, to-wit: phosphorus or pe-
"troleum, or any of the products of petroleum, of
"greater inflammability than kerosene oil of the
"the United States standard. In other words, the
"policy specifies a number of violent and danger-
"ous explosives which are prohibited upon the
"premises, and adds other explosives, meaning
"other explosives of their nature and kind; and
"then follows a list of a lower degree of explosive
"power which the insurer elects to exclude from
"the premises. These are also specified, but no-
"where do we find there is any exclusion of blast-
"ing powder. From an examination of the whole
"policy, it is very plain that this is the proper in-
"terpretation to be given to the expression 'other
"explosives'. It was evidently so intended by the
"insurer, as, in another paragraph, it provides for
"extent of its liability where fire ensues from an
"explosion of any kind, by limiting it to the dam-
"ages done by fire only. Now, it must have been
"the understanding of the insurer that as all kinds
"of explosives were not excluded from the prem-
"ises, there might be destruction of the property
"resulting from the explosion, and, in that case,
"the policy provides that its liability shall only
"extend to the damage caused by fire only, if fire
"should ensue. This provision indicates that the
"plaintiff in error did not expect the premises to
"be kept free from explosives, excepting those par-
"ticularly specified and those of the same class, and
"that in case other explosives not excluded from

"the premises were allowed thereon and an explo-
"sion occurrd, that the company's liability should
"only extend to the damage done by fire alone. In
"accordance with the general rule that provisions
"relating to forfeiture should, when ambiguous, be
"so construed as to prevent forfeiture, the courts
"have, as a rule, construed the condition as to
"the keeping and use of hazardous articles upon in-
"sured premises liberally in favor of the insured
"whenever there is an ambiguity in such condi-
"tion."

SEVENTEENTH. Judge Holland, supporting his dissenting opinion by many decisions of many courts, said:

"The rule of legal construction that general
"words following an enumeration of particulars
"are to have their generality limited by reference
"to the preceding particular enumeration, and to be
"construed as including only all other articles of the
"like nature and quality, is usually applied to stat-
"utes giving to certain classes special privileges,
"and those inflicting a penalty or forfeiture; also
"to provisions in contracts intended to work a for-
"feiture; and especially is it rigidly adhered to in
"insurance agreements containing provisions in
"which general words follow particular enumera-
"tions and are inserted in clauses for the purpose
"of working a forfeiture of the agreement. This
"is the rule universally adopted by the courts. * * *

"These are a few of the cases illustrating the
"application of the ejusdem generis rule of inter-
"pretation of statutes, and is applied, for the same
"reasons, with like effect in the construction of con-
"tracts * * * * * especially in policies of insurance
"to clauses intended to work a forfeiture against
"the insured. The use of words and phrases, the
"scope and extent of which are uncertain and indefi-
"nite, is not to be encouraged in contracts, and es-
"pecially should they be avoided in contracts of
"insurance in which the law holds both parties
"equally bound to the provisions of the writing,
"when, as a matter of fact, as a rule, the insured

"is either entirely ignorant of all the terms "of the policy, or is possessed only of a vague in- "formation of their extent and meaning. The in- "sured, notwthstanding, is, as a matter of public "policy, presumed to know and required to observe "every covenant and requirement contained in the "policy. The policy is so skillfully drawn by the "insurer, who is not only presumed to know but "who as a rule, actually does know the existing con- "ditions and uses of the property insured. It is "therefore no hardship to insist that provisions "therein contained, calculated to work a forfeiture "shall be specific and certain, especially should this "be required in prohibiting the use of keeping haz- "ardous articles upon the premises, and to allow "the use and keeping of such only to work a for- "feiture as are expressly prohibited. The fact "that a great variety of explosives are constantly "used by the people in all walks of life, for various "purposes, is the strongest argument against the "injustice of construing the catch-all phrase 'oth- "er explosives' in this policy in the broad and com- "prehensive sense. The old fashioned gun cap and "the head of some matches in every day domestic "use are 'explosives', and though of such infinites- "imal hazard as to warrant the assumption that they "were not to be regarded as included in 'other ex- "plosives', yet if they are not to be included in "'other explosives', of what degree of hazard and "difference of explosive force shall indicate where "the line shall be drawn, if we stop short of in- "sisting that 'other explosives' shall mean explo- "sives of a like kind, nature and hazard of those "particularly specified. And why not insist upon "this rule of interpretation? The insurer writes "the policy, and it is a very simple matter to pro- "hibit the use of an article on the premises by name "and by use of general words, all of its class and "kind."

"The evidence shows that it has been the cus- "tom and usage among the miners in the coal min- "ing district of Pennsylvania to keep blasting pow- "der upon the premises. The Act of 1893 "of this state prevents these workmen from taking "quantities of this powder in the mines, and in or-

"der that they may continue in the work of coal "mining, it is necessary for them to have a safe and "dry place to keep their powder. These industrial "conditions necessitated the practice of keeping "small quantities of blasting powder upon miners' "premises, which has long since grown into a cus- "tom. Neither the practice nor the existence of the "custom is disputed, by the insurance company."

"The company's agent who took this insurance "has lived in the mining district for upward of "twenty-three years; he has represented this insur- "ance company for more than six years, and for "which company he has been insuring miners' ten- "ements in this vicinity. The plaintiff in error not "only did not attempt to produce evidence to con- "tradict the proof of this universal habit of keep- "ing blasting powder upon the premises, but did "not even cross-examine the numerous witnesses "called to establish the fact, and the defendant in "error showed by the company's agent that he, in "this case, actually charged and collected from "Mrs. Penman a rate nearly double the usual rate "for tenement house insurance, and that the extra "amount collected was to compensate the insurance "company for the additional risk it was to assume "in insuring the property against the risk of keep- "ing blasting powder on the premises."

"With this knowledge of a hazard, for which the "company was paid to assume and which had grown "into a custom long known to its agent, against "which it could have so easily protected itself in "its policy by inserting the words 'blasting pow- "der', if it intended to exclude it, it has no just "ground whatever for now insisting upon forfeiting "the policy upon an indefinite and general use of "terms. There can be no other view, however, than "that blasting powder was never intended to be cov- "ered by the expression 'other explosives.'"

EIGHTEENTH. Judge Holland further holds in his dissenting opinion as follows:

"The property here insured was located in the "the state of Pennsylvania. The policy was made

"and delivered here where the contract is to be "performed. It is, therefore, a Pennsylvania con- "tract and to be interpreted by the laws of this "State, which laws, however, so far as applicable to "the facts of this case, do not differ from the law "as found in the text books and decisions of courts "of last resort in other jurisdictions."

NINETEENTH. The majority opinion written by Judge Lanning held that it was error to admit the testimony of Mr. Brown, the agent of the insurance company who made the contract with your petitioner who testified that he knew at the time of accepting the insurance that the building was to be occupied by miners and that it was their custom to keep blasting powder in their houses, and that for this reason he charged a higher rate of insurance than he otherwise would have charged; and concludes as follows:

"We think the policy in suit prohibited the keep- "ing of blasting powder on the insured premises, "that parol testimony was improperly admitted to "vary the terms of the policy, and that the trial "court should have directed a verdict for the de- "fendant in accordance with its request."

TWENTIETH. Judge Holland in his dissenting opinion on this same subject, said:

"It is conceded to be a binding rule that 'in courts "of law the written contract shall be regarded as "the sole repository of the intentions of the parties "and that its terms cannot be changed by parol "testimony', but, in the trial of this case, this prin- "ciple was not in the least violated, nor was the "parol testimony admitted for the purpose of vary- "ing the terms of the policy, as we view the case. "Certain hazardous explosives, specifically named "were prohibited from being kept or used upon "the insured premises. Blasting powder was not "named, but following the enumeration of the ex-

"plosives excluded, the phrase 'other explosives' "was used, and notwithstanding the fact that blast- "ing powder was not in terms excluded, it is now "held by the plaintiff in error that blasting powder "was excluded under the general terms 'other ex- "plosives'. The parol testimony was admitted, not "for the purpose of varying the terms of the con- "tract, but for the purpose of showing that blast- "ing powder was not an 'explosive' of the same "kind as those enumerated, but was one of much "lower explosive force, and that it was a custom "arising out of the necessity of the coal mining "business, for miners to keep blasting powder, in "small quantities, for use in the mines, upon their "premises, and that the insurance company knew "this custom prevailed in this community long be- "fore and at the time this insurance was effected, "and that it knew these houses were to be tenement "houses in this mining district where the custom "prevailed, and that the company, through its "agent, Brown, collected an additional premium for "the risk resulting from the recognized and known "custom of keeping blasting powder upon the prem- "ises. Blasting powder not having been specifi- "cally excluded, as I shall show hereafter, it was "proper to admit the evidence for the purpose of "ascertaining the understanding of the parties to "the contract at the time it was executed."

"This judgment should be affirmed for two rea- "sons:

"First. This being a clause in an insurance "policy, the language of which tends to work a for- "feiture, should be construed most liberally in fa- "vor of continuing the insurance, and the general "words 'other explosives' should be restricted to ex- "plosives of a like kind and degree of hazard as "those previously enumerated and with which the "parties is associated, and as 'blasting powder' by "name is not prohibited upon the premises and falls "within the class of prohibited articles only in case "the general expression 'other explosives' under "the circumstances can be said to include it, the "court, before passing upon this question, must "know the nature of 'blasting powder' and any oth- "er fact or circumstance showing the intention of

"the insurer as to the relation of this indefinite "phrase to the subject matter of the insurance.

"Second. 'Blasting powder' not being express- "ly prohibited upon the premises, the defendant in "error was entitled to show the notorious and long "established custom in this mining district for ten- "ants to keep 'blasting powder' in their houses, in "reasonable quantities, for use in the mines, which "practice was known to the insurer's agent who col- "lected a premium for this risk, and having estab- "lished those facts by uncontradicted testimony, the "court should have instructed the jury that the "keeping of blasting powder upon the premises, as "shown in this case, did not forfeit the insur- "ance." * * * * *

"It was further established by a great number of "witnesses, running back for more than ten years, "that the universal practice in the mining regions "wherein this property was located, among miners, "was to keep blasting powder in their dwelling "houses. This general and universal practice was "known to the agent of the insurance company, "who has been placing insurance upon like dwell- "ings, the tenants of which followed a like prac- "tice for a great number of years. It was fur- "ther shown by undisputed evidence that blasting "powder is not the same as gun powder, but is an "explosive of a very much lower degree."

"Among other questions properly submitted to "the jury, the learned trial judge submitted the "question as to whether, under the facts and evi- "dence proven, blasting powder was included in "the terms 'other explosives'. On all questions sub- "mitted, the jury found in favor of the defendant "in error, and returned a verdict for the amount "of the insurance. This submission, among oth- "ers, was filed as a reason for a new trial. This "refused, an appeal was taken to this court."

"There are seven assignments of error, which "raise only two questions of importance in the de- "termination of this appeal.

"First, as to whether the learned trial judge was "in error in admitting the evidence of witnesses as "to the custom, and of W. S. Brown, the agent of "the insurance company; and, second, as to whether "it was error in the trial judge in refusing to un- "qualifiedly affirm the company's third point upon "which the court was requested to charge the jury. "It was as follows:

"'If the jury believe from the evidence that the "plaintiff or her tenant or tenants kept, used or al- "lowed on the insured premises blasting powder, "or other explosives, except gun powder, not ex- "ceeding 25 pounds in quantity, the policy there- "by become and remained void, and the plaintiff "cannot recover in this case, and the verdict should "be for the defendant. A. This point is affirm- "ed, if the jury believe under the evidence that "blasting powder was one of the articles prohibit- "ed by the clause above quoted.'

"There is no doubt about the fact that blasting "powder to the amount at least of a twenty-five "pound keg was kept upon the premises by one "of the tenants. Was the keeping of blasting "powder by the tenants, in quantities indicated by "the evidence, prohibited by the terms of this policy. "This question was submitted to the jury by the "learned trial judge. The plaintiff in error was "not entitled to so favorable a disposition of this "question, as the jury should have been instructed "that in this case the keeping of blasting powder "upon the premises in the quantities and in accord- "ance with the custom, was not a violation of any "of the requirements of the policy."

TWENTY-FIRST. That your petitioner is informed and believes that her contract of insurance with the respondent was negotiated, made, countersigned by Brown Brothers, the agents, consideration paid therefor and delivered in the State of Pennsylvania, and that it is, therefore, a Pennsylvania contract, and that this controversy should be decided according to the laws and deci-

sions as laid down by the several courts of that State, and that the majority opinion of the Circuit Court of Appeals is not in accordance with such decisions.

TWENTY-SECOND. Your petitioner is informed and believes that the opinion of the said majority of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Pennsylvania, as well as in conflict with a majority of the decisions of Appellate Courts of the other states, as well also as the Appellate Federal Courts and the United States Supreme Court, and that this case should be reviewed by your Honorable Court, not only to correct a grievous wrong did to your petitioner, but also to make the decisions on the points involved uniform.

TWENTY-THIRD. Your petitioner is informed and believes that the questions raised by the insurance company, for the purpose of forfeiting this contract of insurance are new ones and affect the interest of the public, and that thousands of similar contracts are in existence and are being renewed and made every year on the same class of property and occupied in the same manner and under the same conditions as the premises involved in this controversy; and that it is therefore a question of great importance to the public as well as to the insurance companies to have the questions involved in this cause decided by the final appellate jurisdiction of this country.

TWENTY-FOURTH. That your petitioner is informed and believes from inquiries made of other insurance agents and companies that the insurance companies as a general rule do not interpret the language of this policy to prohibit the keeping of blasting powder on the insured premises, and that if the present decision in this case is permitted to stand it not only does harm, great wrong and injury but is contrary to the general interpretation of the insurer and insured as well as to the law of the land.

TWENTY-FIFTH. That your petitioner further avers that the building destroyed was her only property and that she has been as diligent in presenting this petition as she could possibly be considering her financial circumstances and the cost and expense of preparing this petition and the records for this Honorable Court's review.

TWENTY-SIXTH. Your petitioner is informed and believes that in the absence of the contract of insurance specifically prohibiting the use or keeping of blasting powder on the premises that the words "other explosives" did not include it as a prohibited article, unless the respondent proved that blasting powder was of the same kind, nature and character of explosive as those specifically enumerated in said policy, and that in the absence of any such testimony produced by the respondent the contract of insurance in this case could not be declared forfeited.

TWENTY-SEVENTH. Your petitioner is informed and believes that when the respondent's affidavit of defense alleged as a ground for forfeiture of said contract of insurance "there was kept, used and allowed on the insured premises *blasting powder or some other explosive differing essentially from gunpowder* without any provision allowing the same being provided by agreement indorsed on the policy or added thereto," that the burden of proving this fact was placed upon the respondent, and that in the absence of proof produced on the part of the respondent that blasting powder differed essentially from gunpowder in that it was a more dangerous or inflammable explosive, or at least equally as dangerous and inflammable as gunpowder and that the quantity of blasting powder stored therein exceeded twenty-five pounds, this contract of insurance could not be declared forfeited.

TWENTY-EIGHTH. Your petitioner is informed and believes that the burden of proof to establish a for-

feiture was on the respondent and that this burden never shifted from the respondent to the petitioner, and especially is this true in the absence of any proof offered by the respondent to establish the fact that blasting powder was included in the terms "other explosives"; that the only question at issue under the pleadings then was the comparison of blasting powder with gunpowder, and that there was no burden placed upon the petitioner during the trial of the case, either under the evidence or the pleadings, to prove that blasting powder was of a lower degree or less inflammable explosive than "Greek fire, benzine, benzole, ether, gasoline or naptha."

TWENTY-NINTH. Your petitioner is informed and believes that even though it should be finally held and dedetermined that blasting powder is included in the prohibitory clause of the policy, the fact of the respondent's agent knowing that blasting powder would be kept and stored in the insured premises at the time of accepting the risk, and that it was a general custom to so store such articles, that the respondent could not thereafter declare a forfeiture of the contract.

THIRTIETH. Your petitioner is informed and believes that the agent of the insurer was not under the terms of the policy prohibited from accepting a risk on a premises in which blasting powder was stored or kept, but on the contrary was specifically empowered to do so, provided he made such an endorsement on the policy which he was authorized to do under its terms, and that a forfeiture could not be declared of this policy when the agent accepted a risk and charged an increased rate therefor which he was authorized and empowerd to do by the terms of the contract, and then by reason of his misinterpretation of the meaning of his contract or mistake or neglect to make the indorsement on the policy as therein provided or required, bar the petitioner from recovery on the policy.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, for the Third Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of the said Circuit Court of Appeals in the said case in the said Court entitled, "Saint Paul Fire and Marine Insurance Company, Plaintiff in error, versus Mrs. Annie E. Penman, Defendant in error," to the end that the said case may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891, or that your petitioner may have such other and further relief and remedy in the premises as to this Court may seem proper and in conformity with the said Act; and that the said decision or judgment of said Circuit Court of Appeals reversing the judgment of the Circuit Court which was in favor of your petitioner, may be reviewed.

And your petitioner will ever pray.

MRS. ANNIE E. PENMAN,

Petitioner.

FREDERIC D. MCKENNEY,

A. J. TRUITT,

B. M. CLARK,

Attorneys for Petitioner.

STATE OF PENNSYLVANIA, }
COUNTY OF JEFFERSON. } SS:

Mrs. Annie E. Penman being duly sworn, says: I am the petitioner above named. The foregoing petition is true of my own knowledge, except as to all matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

MRS. ANNIE E. PENMAN.

Sworn to before me 25 day of January, 1908.

JESSE C. LONG,

(SEAL.) Notary Public.

My Commission expires February 13, 1911.

SUPREME COURT OF THE UNITED STATES

MRS. ANNIE E. PENMAN, Petitioner, AGAINST ST. PAUL FIRE & MARINE INSURANCE COMPANY, Respondent.	October Term, 1908.

Brief for Petitioner on Application for Writ of Certiorari.

This is an application for a writ of certiorari to require the Circuit Court of Appeals for the Third Circuit to certify to this Court for its review the case of St. Paul Fire and Marine Insurance Company, Plaintiff in Error, against Mrs. Annie E. Penman, Defendant in Error.

FACTS.

Under date of February 4th, 1904, the Respondent issued at its Punxsutawney, Pennsylvania, Agency what is known as a Standard Fire Insurance Policy in the State of Pennsylvania, being policy No. 1,458, of this agency, to the Petitioner for a term of three years from its date for $2,600, fire insurance, on a two-story frame shingle roof building, 29x96 feet, and additions, to be occupied by tenants as dwellings, situate in Elk Run Addition to Punxsutawney, Jefferson County, Pa. (Record, p. 7.) A premium of $65 was then and there paid, which was at the rate of $2.50 per one hundred dollars, or about double the usual rate (pp. 70, 71).

Among other provisions in this policy the following are important in the determination of this action, namely:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if . . . (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder, exceeding twenty-five pounds in quantity, naptha, nitroglycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard." . . .

"This company shall not be liable for loss caused directly or indirectly . . . (unless fire ensues, and in that event—for the damage by fire only) by explosion of any kind," . . . (pp. 9, 10).

The policy further provided that it should not be valid until countersigned by the duly authorized agent at Punxsutawney, Pa. Respondent's Agent at Punxsutawney,

Pennsylvania, did so countersign same on the date thereof (p. 19). This agency had represented respondent at this place for at least six years prior thereto (pp. 90-91). Having so countersigned the policy, respondent through its agents received the premium and delivered the policy to the petitioner (p. 44).

Respondent's agent testified at the trial—which was uncontradicted—that at the time he placed the insurance, he knew the character of the building which he was insuring, and that he had knowledge at that time who was to occupy the building; that the building was located within a few hundred feet of the Elk Run Shaft of the Rochester and Pittsburg Coal and Iron Company, a colliery, and that miners principally inhabit that particular district; that he knew the building was to be occupied by coal-miners and that he always understood that miners keep blasting-powder about their dwellings; that he acquired this knowledge in his twenty-three years in the insurance business in that particular region of the State where mining coal is carried on; that he knew as a fact then that miners keep more or less blasting powder all the time in their dwellings and had this knowledge at the time he accepted this risk (pp. 67, 69, 71, 75, 77,). That by reason of the fact that the property insured was a miners' dwelling house, in which blasting powder would be kept for use in their business or trade, he charged an extra premium—an increased rate on this policy, (pp. 70, 71, 75, 77).

The local agent also testified at the trial that soon after the insurance was effected, respondent's Special Agent inspected the risk and being informed that an increased charge had been made, because of the fact that miners were to occupy the building, pronounced the risk very satisfactory. (pp. 71, 76).

It was proved on behalf of the petitioner, without contradiction, by numerous witnesses, that for a period running back for more than ten years that the general and universal custom in the coal-mining regions where this property was located, among miners, was to keep blasting-powder in their dwelling houses, and that this has been for years of public notoriety in these mining regions. (pp. 62, 63, 64, 66, 67, 80, 81, 82, 83, 87). Also that the Statute of Pennsylvania of May 15, 1893, relative to bituminous coal mines, Article 8, Section 5, P. L. 65, provides.—"No powder or high explosive shall be stored in any mine and no more of either article shall be taken into the mine at any one time than is required for any one shift, unless the quantity be less than five pounds . . ." (pp. 64, 100). That miners take small cans of blasting-powder containing from two to five pounds with them into the mines for a shift or daily use, being necessary in their trade, and that the building burned was occupied by miners, was of the value of over $2,900 and was the only property owned there by the petitioner. (pp. 44, 63, 64, 67).

Petitioner further proved without contradiction that both gunpowder and blasting-powder are black powders and that blasting-powder is a very much lower degree of explosive than gun-powder, and that blasting-powder is used in blasting down the coal in mines. (pp. 64, 89).

On the evening of December 7th, 1904, the property thus insured was totally destroyed by an accidental fire occasioned as shown by the evidence on part of respondent by one of the tenants throwing a lighted squib into a can containing blasting-powder. (53). Notice thereof and formal proofs of loss, as required by the terms of the policy, were made and forwarded to the respondent and duly received by it. (p. 41.)

Respondent having refused to pay the amount of the insurance, suit was brought on the policy in the Court of Common Pleas of Jefferson County, May 26th, 1905, and on June 22nd, 1905, on petition of respondent alleging that it is a corporation under the laws of the State of Minnesota and a non-resident of the State of Pennsylvania, and that petitioner is a citizen of the State of Pennsylvania, and that the amount in dispute exceeds $2,000, an order was made removing the cause to the Circuit Court of the United States for the Western District of Pennsylvania. (pp. 15, 16, 18). Respondent, by Affidavit of Defense filed, denied its liability on three grounds:

First. That blasting-powder, an alleged prohibited article, was kept on the premises.

Second. That the building was entirely destroyed by an explosion, which relieved it from liability.

Third. That a change of title had occurred since the issuing of the policy, which relieved it from liability. (pp. 19, 20).

The second and third grounds of defense were practically abandoned at the trial of the case. The uncontradicted evidence on part of petitioner being that the title to the property burned was in petitioner and it being further shown by many witnesses that if an explosion took place preceding or at the time of the fire, no appreciable damages were occasioned thereby, as the building, the roof thereon, and the doors and windows therein were intact when the fire took place, and some of the tenants moved out their furniture during the fire, and that one of the tenants burned at the fire, appeared to be saturated with oil. (pp. 33, 35, 36, 39, 41, 42, 44, 65, 78, 80, 81).

At the trial, December 8th, 1905, a verdict was rendered in favor of the petition for $2,756, being the amount of the insurance with interest thereon from the date of the fire. On Writ of Error, the judgment of the Circuit Court was reviewed by the United States Circuit Court of Appeals for the Third Circuit, and February 25th, 1907, Judge Lanning handed down an opinion in which Judge Gray concurred, reversing the judgment below, and Judge Holland filed a dissenting opinion for affirmance the judgment below. Petitioner presented her petition for a rehearing, which was denied her by order made April 11th, 1907.

POINT I.

The question here involved is so important as to merit the consideration of this Court.

In the bituminous and anthracite coal-mining regions of the State of Pensylvania,—and these industries are possibly the greatest of this great state's commercial activities, an incalculable amount of capital being invested and a great number of persons employed and interested therein,—the miners' dwelling houses and other buildings, incident to these large operations, are and for years have been insured under what is known as the Standard Fire Insurance Policy of the State of Pennsylvania, being the same policy involved in this litigation. Thousands of these policies and millions of dollars of insurance thereunder are now in force in these mining regions, and other millions in premiums have been received by insurance companies for same. That blasting powder has been kept in these miners' dwelling houses and other buildings in these regions for years past, being a necessary incident in the conducting of these mining operations and a

general and universal custom connected therewith, has also been of public notoriety all through the regions for many years. Petitioner's local agent recognized this general knowledge in placing the risk in this action in increasing the premium, by reason of the fact that the property insured was a miners' dwelling. If respondent's contention is correct, insurance companies are receiving large sums in premiums on void policies in these mining regions, but we know of no case, reported or otherwise, wherein it was alleged that blasting powder was a prohibited article under the terms of the Standard insurance policy. If so intended, it should have been incorporated in the policy, and this not having been done, the contract should be construed strictly against the company and liberally in favor of the insured. No other insurance company to our knowledge has ever refused to pay a loss on this ground.

POINT II.

The policy in suit is a Pennsylvania contract, and, therefore, governed and determined by the law of this State.

The policy in suit having been made and executed at the office of respondent at its Punxsutawney, Pennsylvania, agency, and there countersigned by its agents, the premium paid and the policy there delivered to the petitioner, the property insured being located in said state, and the contract to be performed therein, therefore it is a Pennsylvania contract and the law of this state governs and determines this action. And we contend that by invoking three principles of law that are uniformly ruled in this state, the judgment of the Circuit Court should stand, viz.:

(a) Where the terms of a policy of insurance are susceptible without violence of two interpretations, the construction which is most favorable to the insured to indemnify her from loss sustained should be adopted.

(b) Where the storage or use of blasting powder was not prohibited in terms, in the absence of the Court's interpretation of the contract, it was a question of fact for the jury whether it came within the description of "other explosives", and in the absence of proof it is not a matter of which the Court will take judicial notice.

(c) A parole waiver by an agent of the insurer of a condition of the policy is binding on the insurer notwithstanding a provision in the policy that an agent can make such waiver only by writing endorsed upon the policy. And the knowledge of the agent of the conditions existing at the date of the insurance is effected is the knowledge of the company itself.

POINT III.

The necessity of avoiding a conflict between the several Circuit Courts of Appeal as well as between these courts and the courts of Pennsylvania, in the law determining this policy, is here involved.

The majority opinion of the Circuit Court of Appeals is unsupported by a single decision of the courts of Pennsylvania, three decisions of the Federal courts being all the cases of any nature cited in support thereof and these three cases are given to support to the following excerpt from the opinion, namely:

"While cases may be cited in which parol testimony has been allowed to modify the terms of policies of insurance, even where those policies have been free from ambiguity or obscurity and from fraud or mistake, the rule to be applied by our federal courts, at least, in the construction of such instruments, is the same as that applied in the construction of other written contracts."

The testimony adduced by petitioner on the trial was not an attempt in any particular to modify the terms of the policy in suit, but to determine its meaning and extent. The facts and circumstances brought by the evidence of petitoner to the attention of the court and jury were helps to a correct exposition of the words the parties had employed.

The dissenting opinion is fortified by forty-four citations, seventeen thereof being decisions of the highest courts of Pennsylvania. A careful perusal of the majority opinion shows that it is in direct conflict with the decisions of the Pennsylvania courts on the legal questions involved in this action. And we cannot believe that the present decision would stand the test of the other Circuit Courts of Appeals or be followed by them.

POINT IV.

The question sought to be raised by the insurance company in this case is a new one and affects the interest of the public.

The question sought to be raised by the Insurance company in this litigation is whether blasting powder, the use of which is a necessity in the trade of mining coal, and the keeping of which on the insured premises is not

specifically prohibited in the Standard Fire Insurance policy, vitiates the policy when kept by miners in the insured premises. It is proven that both blasting powder and gun powder are black powders; that blasting powder is an explosive of a very much lower degree than gun powder, twenty-five pounds of which are permitted to be kept on the insured premises under the terms of the policy. And we contend as a legal proposition that blasting powder is not prohibited by the words "other explosives" in the policy. The policy specifically names as prohibited articles two classes or kinds of powder, and is entirely silent as to any other class or kind of powder, unless the words "other explosives" includes all other classes and kinds. The first class specially named in the prohibitory clause is dynamite, a powerful and highly explosive powder. The second class is gunpowder, a less dangerous and less powerful powder, 25 lbs. of which are permitted on the insured premises. Blasting powder, not mentioned, is still a lower degree of explosive and less dangerous than gunpowder. Having particularly expressed in the policy that 25 lbs. of gunpowder, which is a black powder, may be kept on the insured premises without rendering the policy void the company excluded blasting powder, another black powder in the same class and of same generic nature as gunpowder from the prohibited articles under the terms "other explosives". Again, the policy specifies a number of violent and dangerous explosives which are prohibited upon the premises and adds "or other explosives". This must mean other explosives in the class previously mentioned and of a nature as dangerous as the specified class, it not being intended that "other explosives" should extend to other articles of a much lower explosive power, which in no sense could be classed among these dangerous and highly explosive articles. It is manifest that the lower explosives not named were not intended to be prohibited. These are also named but nowhere do we find blasting powder among them or its exclusion.

Of course "or other explosives" does not include all other explosives of which there are possibly hundreds in nitrates, chlorates, acids, volatile oils, and different mechanical mixtures or chemical compounds; if all are included then it would embrace matches and toy pistol paper caps, etc. A careful reading of the policy shows that the lower explosives were not intended to be prohibitd else why follow the words "or other explosives" with "phosphorus, or petroleum or any of its products . . . " Again, if all explosives are meant why does the company further on insert in the policy "This company shall not be liable for loss caused directly or indirectly . . . (unless fire ensues, and in that event, for the damage by fire only) by explosion of any kind". Certainly this provision indicates that respondent did not expect the premises to be kept free from explosives, excepting those particularly specified and those of same nature and class, and that in case other explosives not excluded from the premises were allowed thereon and an explosion followed, that the company's liability should only extend to the damage done by fire alone.

POINT V.

The agent of the insurance company was a competent witness as to all matters connected with the placing of the risk and the issuing of the policy.

The knowledge of the agent of the class and occupation of the occupants of the building, the common and ordinary custom of keeping more or less blasting powder on the insured premises, was the knowledge of the company itself and his charge of an increased premium by reason of these conditions is its act. Again, the condi-

tions connected with the risk here involved were facts of public notoriety and therefore are presumed to have been known to the parties at the time of making the contract. The evidence is that the agent knew when placing the risk that coal miners would occupy the premises insured and that blasting powder was a necessity in carrying on their trade and it would be kept in the insured premises. And when the premises insured were burned that they actually were occupied by miners.

[redacted]

POINT VI.

The burden of proof was on the insurance company to show that blasting powder was of the same generic nature and as highly explosive as gunpowder, and that a quantity in excess of twenty-five pounds thereof was kept on the insured premises. And in the absence of such proof by the company the court will not take judicial notice thereof.

Especially is this true when the purpose of the proof is to work a forfeiture of the contract. The burden was on the company to show that the explosive was prohibited by the terms of the policy and that it was kept on the premises. The burden of proof never shifts. The allegation was made by the company and the burden rested there. If gunpowder had been kept on the premises, the burden certainly would have been on the company to establish that the quantity was in excess of 25 lbs., before a recovery could be barred. The insured has not the burden of proving compliance with the conditions in the policy, but the insurer must show the breach of the condition. The assumption in the majority opinion of the Circuit Court of Appeals that the words "or other explosives"

included blasting powder, or that "benzine, benzole, ether, fire works, gasoline, Greek fire, naphtha and nitro glycerine are explosives of lower power than dynamite or gunpowder, or even than blasting powder", is taking judicial notice of these facts in the absence of proof and putting a burden on insurer which was not raised by the pleadings. If the burden did not shift it was squarely met by the insured's evidence showing that both gunpowder and blasting powder are black powders and blasting powder is a very much lower explosive than gunpowder.

POINT VII.

The fact that Judge Holland filed a dissenting opinion sustaining Trial Judge Buffington, and the grounds on which that opinion is based show the necessity of having this case reviewed.

The fact that Judge Holland felt it necessary to dissent so emphatically from the opinion expressed by the other two judges and to state his position at such length, shows that he considered it was a grave error for the Circuit Court of Appeals to reverse the verdict of the lower court. Judge Holland deals exhaustively with the questions involved, and ably supports the legal views of trial Judge Buffington.

Judge Holland says: "I am unable to agree with the majority of the Court in the conclusion at which they arrived in this case. The Court below is reversed, and the reasons assigned are that the "policy prohibited the keeping of blasting powder on the insured premises, and that parol testimony was improperly admitted to vary the terms of the policy, and that the trial court should have

directed a verdict for the defendant in accordance with its request".

"This judgment should be affirmed for two reasons:

"First. This being a clause in an insurance policy, the language of which tends to work a forefiture, should be construed most liberally in favor of continuing the insurance, and the general words 'other explosives' should be restricted to explosives of a like kind and degree of hazard as those previously enumerated, and with which the parties is associated, and as 'blasting powder' by name is not prohibited upon the premises, and falls within the class of prohibited articles only in case the general expression 'other explosives' under the circumstances can be said to include it, the court, before passing upon this question, must know the nature of 'blasting powder' and any other fact or circumstance showing the intention of the insurer as to the relation of this indefinite phrase to the subject matter of the insurance."

Second. "Blasting powder" not being expressly prohibited upon the premises, the defendant in error was entitled to show the notorious and long established customs in this mining district for tenants to keep "blasting powder" in their houses, in reasonable quantities, for use in the mines, which practice was known to the insurer's agent, who collected a premum for this risk, and having established those facts by uncontradicted testimony, the court should have instructed the jury that the keeping of blasting powder upon the premises, as shown in this case, did not forfeit the insurance."

Judge Holland fortifies his able dissenting opinion of twenty-one pages with numerous authorities, and we believe it will be authoritative on the questions discussed.

POINT VIII.

The argument for the Petitioner is sustained by the decisions.

A.

This action is governed by the law of Pennsylvania:

"As a general rule, the validity of an insurance policy and the stipulations therein are determined by the law of the place where the contract is executed."

22 Am. & Eng. Ency. of Law, pp 1349-1350.

"In the absence of evidence that a contract is to be executed, or was executed outside of the state of Pennsylvania, the transaction is governed by the law of Pennsylvania."

Mann v. Salsberg, 17 Pa. Superior Court, 280 (1901).

"Matters connected with the performance of a contract are governed by the law prevailing at the place of performance."

Musser v. Stauffer, 192 Pa. Supreme Court, 398 (1899).

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Act Sep. 24, 1789, c. 20, sec. 34.

B.

The knowledge and act of an insurance company's local agent connected with the placing of a risk is the knowledge and act of the company itself.

"Where at the time of issuing an insurance policy, the company knows or ought to know that one of the conditions thereof is inconsistent with the facts, and where the insured has been guilty of no fraud, the company is estopped from setting up the breach of said condition."

"In an action upon a fire insurance policy, it appeared that the insured acquired title to the property insured by a sheriff's deed. About a month after the date of the deed, he signed a paper declaring that four other persons had contributed to the purchase money of the property at the sheriff's sale, and agreeing that he would hold the title for the joint use of himself and the persons who had contributed, and that, when the property was sold or disposed of by him, he would contribute and pay to the contributors each his pro rata share of the proceeds. Seven years afterwards he applied to the defendant's agent for insurance and the agent asked the insured 'who the title was in,' to which the insured replied, 'the title is in me I have the deed.' The defendant subsequently accepted two annual premiums, and the insurance was renewed without any further information or inquiry. The company, through its agent, previously knew that more than one person was interested in the property or the proceeds thereof. Held, (1) that if a mistake had been made it was chargeable, not to the insured, but to the company's agent, and it should be imputed to the company itself; (2) that a judgment on a verdict for plaintiff should be sustained.'

"This was 'defendant's agent at Huntingdon where the property was located and where both the insured and the agent resided.' "

Caldwell v. Fire Association, 177 Pa. Supreme Court 492 (1896).

"The defendant claims that the court below erred in submitting this case to the jury, first, because there could be no recovery, the policy containing the condition that it should be void 'if the subject of insurance be a building on ground not owned by the insured in fee simple.' It is admittedly true that the plaintiff's building was constructed upon land the possession of which was acquired by the plaintiff by lease, that no application was filed

no fraudulent representations made by the plaintiff in the acquiring of the insurance. It was testified to upon the trial that before the issuing of the policy the agent of the defendant company went upon the property and was told that the plaintiff's interest in the property was that of a leasehold. The right to recover under such circumstances, in spite of a conditon of this character written in the policy itself, has been repeatedly determined by the Supreme Court, so that it may be regarded as being the well established law of this Commonwealth."

"A policy of insurance against direct loss by damage by fire to this building was issued by the local agent of this company, at the plaintiff's request."

Davis v. Insurance Co., 5 Pa. Superior Court 506, 512, 513, (1897).

"The policy contained a provision that it should be void, if the assured was not the sole and unconditional owner of the property, or if the building stood on ground not owned in fees-imple by the assured, or the interest of the assured was not truly stated, unless consent in writing was indorsed on the policy by the company: No representation of any kind upon the subject of the title of the assured to the real estate having been made the policy written upon the knowledge of the company's agent was to be interpreted as made in view of the facts of the case, and as intended to cover such interest as the assured had therein. That interest was a leasehold only, but an insurable interest."

Phila. Tool Co. v. Assurance Co., 132 Pa. Supreme Court 236, (1890).

"Where the insurance was 'on barley and malt in assured's malt-house and brewery,' and a conditon was that the risk could not be increased without notice to the company and endorsement on the policy, the fact that the insured carried on distilling in the building would be fatal to the claim of the assured for loss, unless the company had notice of the distilling before the insurance."

"Notice to the agent of an insurance company is notice to the company."

"If the insurance was effected with full knowledge by the agent of the company that distilling was to be carried on, the condition as to endorsement of notice had no application, and the company could not allege an increase of risk."

The People's Ins. Co. v. Spencer, 53 Pa. Supreme Court 353, (1867).

"A contract of insurance must have a reasonable interpretation, such as was probably in the contemplation of the parties when it was made; and when the words of a policy are, without violence, susceptible of two interpretations, that which will sustain a claim to the indemnity it was the object of the assured to obtain, should be preferred."

"An accident insurance company issued a policy to one who was known to the company's general agent to have but one eye, providing, inter alia, for the payment of $1,000 to the assured, in case of his permanent disability by 'the total and permanent loss of the sight of both eyes,' from accidental bodily injuries received while the contract should be in force.'"

"The knowledge of the general agent being the knowledge of the company itself, which therefore must be assumed to have known that it was insuring a man with one eye, the policy must be construed as insuring against the loss of eyesight by the destruction of that eye; notwithstanding the risk of the contract to the insurer was greater than if the assured had had two eyes."

Humphreys v. Na. Benefit Asso'n, 139 Pa. Supreme Court 264, (1891).

C.

Evidence is admissible to show the understanding and intentions of the parties, and the customs connected therewith, at the time the insurance was contracted.

"The word 'contents' in a policy of fire insurance is not a certain and definite description of any particular class of goods, and its meaning must be ascertained by

considering the nature and methods of the business for which the building whose contents were insured was to be used, and the understanding and intentions of the parties as expressed at the time the insurance was contracted, and evidence to that effect and for that purpose may be given at the trial of a suit to recover a loss on the policy."

"Plaintiff insured a barn and butcher shop as one building for four hundred dollars and the contents for four hundred dollars more. He insured a smoke house for five dollars, and its contents for five hundred dollars. The barn and butcher shop were burned with their contents. The smoke house was not burned, but its contents which had been removed to a storage room in one end of the butcher shop, were wholly consumed. Plaintiff claimed to recover thirteen hundred dollars, and testified that at the time the policy was being prepared by the president of the insurance company, it was understood by him and the president that the cured meat in the butcher shop was to be included in the insurance of the "contents" of the smoke house. Held, that it was not error for the court to charge that if such was the understanding between the parties plaintiff was entitled to recover."

"Such a case does not involve an attempt to reform a written contract, but to determine its meaning and extent. The rule in equity governing the reformation of contracts is not therefore applicable to it, and the jury is at liberty to determine the question by preponderance of the evidence."

Graybill v. Fir Ins. Assn., 170 Pa. Supreme Court, 75 (1895).

"A policy of fire insurance on a building used for silver plating, contained the stipulation 'this entire policy shall be void if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises . . . gasoline.' Plaintiffs used gasoline in their plating process and for cleaning tools. They kept a barrel of it in an uninsured building about fifteen feet from factory. When gasoline was needed it was drawn from a barrel through a spigot and carried into the factory, where it was emptied

into a kettle holding three or four gallons. On the night when the factory was destroyed by fire, there was no gasoline in the kettle, and the gasoline was not the cause of the fire. Held, that it was proper to admit evidence that gasoline was necessary in carrying on the business of silver plating, and that it was so used when the policy was issued, and continued to be used up to the date of the fire. It was also proper to refuse to charge that if the plaintiffs used gasoline on the premises during the life of the policy, the policy by its terms became void, and there could be no recovery."

"In a contract of insurance it is the intent of the parties to insure the subject of insurance as it necessarily is, and must continue to be, during the life of the policy."

Lancaster Silver Plate Co. v. Fire Ins Co., 170 Pa. Supreme Court, 151 (1895).

"The object of the contract was indemnity. With that object in view, the terms of the policy should be construed liberally; and where any doubt exists as to their meaning, it should be resolved in favor of the insured rather than in the interest of the insurer. Words of the policy susceptible of two interpretations, should be construed to sustain the claim of the insured."

"Moreover, every consideration of public policy demands that insurance companies should be required to deal with their customers with entire frankness; and it is not the province of courts to indulge in conjecture favorable to such insurance companies as are disposed, upon mere technicalities, to avoid the payment of honest claims."

"Moreover, the insurance company, when it issued the policy, was chargeable with knowledge of the corporate powers of the plaintiff company, and the nature of its business in the storage and transportation of oil; or, if not then at least with knowledge of the usual and customary methods of conducting the business pertaining to the property which it insured."

W. & A. Pipe Lines v. Insurance Co. 145 Pa. Supreme Court, 346 (1891).

"A policy of life insurance in which the premiums were payable on specified days, was issued to plaintiff, with a clause of forfeiture in case of non-payment at the day. The policy was forfeited for such non-payment. In an action to recover the paid premiums evidence was admissible to show that it was the custom amongst insurance companies to receive premiums within thirty days after due, if the assured was in his usual health."

"Forfeitures are odious and are enforced only where there is the clearest evidence that that was what was meant by the stipulations of the parties."

"There must be no cast of management or trickery to entrap a party into a forfeiture."

Helme v. Philadelphia Life Insurance Co., 61 Pa. Supreme Court—107.

"Where a policy of fire insurance is issued upon a "stock of dry goods, groceries and merchandise usually kept in a country store", the company is presumed to know what articles such stock of goods may contain, and the fact that the insured keeps in stock certain articles which by a general clause printed in the policy are prohibited to be kept, will not avoid the policy, provided those articles were such as are usually kept in a country store; and evidence is admissible, in an action on the policy, to prove that custom."

Pittsburg Ins. Co. v. Frazee, 107 Pa. Supreme Court, 521 (1885).

"A firm engaged in the business of dealing in photograph supplies had a place of business in the central part of a large city where they rented certain flors of a building. On the building was a policy of fire insurance which provided that the entire policy should be void, 'if (any usage or custom of trade to the contrary notwithstanding) there be kept, used or allowed on the above described premises gunpowder . . . or other explosives'. It was customary for dealers in photographic supplies in this city to put up and sell in small packages a certain flash light powder. It was not customary for dealers to manufacture it on the premises where sold. There was an

explosion in the building, and this was immediately followed by a fire which destroyed the building."

"In this case, as the learned judge said to the jury, there was no 'direct evidence' that the insurance company knew that the McCollin Company was manufacturing its own flash lgiht powder on the premises when the policy was issued. Under the evidence it might fairly be presumed that the photograph supply company dealt in that article and kept it in small quantities for sale on the premises. But as there is no presumption from the nature of the business and the subject of the contract, that the insurance company knew it was also manufactured on the premises, the burden was on plaintiffs to establish by satisfactory evidence that the copany actually did know. It might be presumed to know the ordinary methods and customs of such dealers, and just here comes in the question, what was the custom? Not one dealer or manufacturer, and a number were called, testified that it was a necessary or usual part of the business of a dealer in photographic supplies to manufacture flash powder on the premises where sold; on the contrary, the evidence was that it was neither usual or necessary, the custom of dealers being to buy it of manufacturers, whose factories were generally located in the suburbs of the city, in small quantities, then put up and sell it in small half ounce package. Not a single witness except McCollin testified it was customary for the dealer to manufacture the powder, and the substance of his testimony is, that it was his custom to do so. The testimony wholly failed to show such custom, hence there could be no inference that the insurance company knew of a custom which did not exist. Nor is there any evidence direct or indirect that it knew as a fact at the date of the contract, the McCollin Company manufactured the powder upon the premises."

Lutz v. Ins. Co., 205 Pa. Supreme Court, 159, 162 (1903).

"As the object of a contract of insurance is indemnity against loss by fire, if the provisions of the contract are susceptible of two or more interpretations, that one should be adopted that will make the contract effective for the protection of the insured."

"An insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used."

"The circumstances surrounding the making of the contract and affecting the subject to which it relates, form a sort of context that may properly be resorted to for aid in determining the meaning of the words and provisions of the contract."

"A manufacturing plant consisted of two buildings, one a foundry and machine shop, the other a pattern shop. The buildings were close together. The nature of the business required the use of the patterns in the foundry and machine shop only. When they were not in use they were kept in the pattern shop for storage. A policy of insurance on the plant described the property as 'all situate corner of Fourth Avenue and Market Street.' The patterns were described in the policy as being in the pattern shop, and in the printed part of the policy there was a statement that the undertaking was to insure the property real and personal described in it 'while located and contained as described herein and not elsewhere.' Some of the patterns which were in use were burnt in a fire which destroyed the machine shop, but not the pattern shop. Held, the policy covered the patterns while they were in use in the foundry and machine shop."
Machine Co. v. Ins. Co., 173 Pa. Supreme Court, 53.

"In an action upon a policy of fire insurance, it appeared that the insured had purchased ten gallons of benzine in two five gallon cans, one of which was placed in an outside kitchen, and the other was taken into the parlor, and from it the liquid was poured into a small watering pot, and was thus used to sprinkle over the carpet and furniture. The benzine was purchased about an hour before it was used, and the can which was taken into the parlor was removed from that place immediately after it was used. The contents of one can only was used. An explosion occurred soon after the sprinkling was finished, and a fire resulted from the explosion. Benzine had been used before with perfect impunity, and the

plaintiff had been informed that it was not dangerous to use if there was no light or fire in the room. The policy required that notice should be given "if the risk of the building insured shall afterwards be increased by any means whatever within the control of the assured; or, if said building shall afterwards be occupied in any way so as to increase the risk." No notice was given to the company of the intended use of the benzine. Held, that the policy was not rendered void by the use of the benzine."

"While it may be conceded that benzine was a hazardous article to use in the way that it was used by the plaintiff, such user of such an article was not specifically prohibited by the policy, and therefore the case does not present the aspect of the absolute breach of an express condition."

"If, therefore, where such keeping or use was specifically prohibted, an occasional use was not within the prohibtion, how much more would that be so where the article was not prohibited at all. In this case the use of the benzine was of the most temporary and occasional character. It was used only to clean and protect the carpets and furniture. It had been used before with perfect impunity. The plaintiff was expressly told it was not dangerous to use if there was no light or fire in the room. The decision in the last cited case seems to cover and crontrol every aspect of this. Even if it did tend to increase the risk, a mere occasional use would not be an infringement of the policy, because that kind of use is permissible under a policy which prohibits any use or keeping."

Bentley v. Insurance Co., 191 Pa. Supreme Court, 276, 280, 282, (1899).

"In an action against a beneficial association to recover death benefits, it appeared that the member was a married woman. An affidavit of defense filed by the association set up that the deceased falsely stated that she was not pregnant at the time the application was made. The fact of the assured's pregnancy would only be material, as we have seen, if being disclosed to the underwriter it would have caused him to refuse the risk or demand a

higher premium. Unless such would have resulted from his knowledge of her pregnancy at the time the policy was written, the fact would not have been material to the risk, and consequently an untrue answer to the interrogatory would not have avoided the contract. It was therefore incumbent upon the defendant to set out in its affidavit of defense that the knowledge of the assured's pregnancy would have cause the underwriter to refuse the risk or to have increased the premium.

McCaffery v. Knights of Columbia, 213 Pa. Supreme Court, 609-613-614 (1906).

D.

Where a policy of insurance is susceptible without violence of two interpretations, that which is most favorable to the insured, should be adopted.

"If there be doubt, in view of the general tenor of an instrument of writing, whether the words used therein are to be taken in an enlarged or restricted sense, all other things being equal, that construction should be taken which is most beneficial to the promisee. This rule of construction is perhaps especially applicable to the construction of policies of insurance, the provisions and conditions of which are, as admitted in the argument, prepared by the assurers themselves, and their advisers, persons thoroughly conversant with the principles and practice of insurance, with the utmost deliberation, 'every word being weighed, and every contingency debated,' and, thus prepared, are executed and delivered to the assured, who ordinarily have no part in their preparation."

"It was early held with special reference to contracts of marine insurance that the strictum jus, or apex juris is not to be laid hold on but they are to be construed largely for the benefit of trade and the insured: Tiernay v. Etherington, 1 Burr. 341: a rule which under different forms of expression, has obtained with reference to all kinds of insurance to the present day. Having indemnity for its object the contract is to be construed liberally, to that end

and it is presumably the intention of the insurer that the insured shall understand, that in case of loss he is to be protected to the full extent which any fair interpretation will give."

"The spirit of the rule is that when two interpretations, equally fair, may be given, that which gives the greater indemnity shall prevail."

Tuetonia Fire Ins. Co. v. Mun, 102 Pa. Supreme Court, 94, 95 (1883).

"The same general rule of construction which applies to other instruments applies equally to policies of insurance; that is, they are to be construed agreeably to the intention of the parties. This intention is in the first place to be drawn from the language of the instrument. The words employed are themselves to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usages of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."

"Every condition and provision in an insurance policy the breach of which involves a forfeiture of the contract is to be construed strictly."

"If the terms of a policy are capable of two interpretations equally reasonable, it is the general rule that that construction which is most favorable to the insured must be adopted. As it is the company that prepares the contract, the insured not being consulted with regard to the form thereof, all doubts in regard to its meaning must be solved against the company."

16 Am. & Eng. Ency. of Law 862-3.

"Expressio Unius Est Exclusio Alterius.—The principle that the express mention of one thing implies the exclusion of another thing is occasionally utilized in constru-

ing a contract, but, like other rules of construction, it is useful only for the purpose of arriving at the intent of the parties, and it will not be applied if not in harmony with such intent."

17 Am. & Eng. Ency. of Law 25.

The expression in a contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed.

Higgins v. Eagleton 13 Misc. (N. Y.) 223, 68 N. Y. St. 82.
O'Neil v. Van Tassel 137 N. Y. 297.
Cree v. Bristol 66 N. Y. St. 518.
Hummerquist v. Swenson, 44 Ill. App. 627.

E.

Facts of public notoriety.

Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties at the time of making the contract, and the language used must be construed in reference to such facts.

Woodruff v. Woodruff 52 N. Y. 53.

F.

The burden is on the insurance company to prove the existence of the condition and its violation.

"The majority of courts have adopted the rule that the plaintiff in an action on an insurance policy has not the burden of proving compliance with conditions therein, but the insurer wishing to avoid liability by showing the breach of a condition avoiding the policy has the burden of proving the existence of the condition and its breach."

16 Am. & Eng. Ency. of Law—955.

"2. The burden of proof is on the insurance company, the defendant, to show by the evidence in the case,

to the satisfaction of the jury, that John E. Dougherty broke or violated the condition or conditions of the policy, set up and relied upon by the insurance company to prevent a recovery on the policy. Answer: It not being denied that the deceased came to his death through violent and accidental injuries, such as the general terms any scope of the policy would cover, then, in order to prevent a recovery the jury must be satisfied by the weight of the evidence that the deceased had broken or violated the conditions of the policy."

Daugherty v. Ins. Co., 154 Pa. Supreme Court, 386 (1893).

G.

A parol waiver by an agent of the insurer of a condition of the policy is binding on the insurer.

"A limitation or condition in a policy of insurance intended for the benefit of the corporation may be waived by it, and the fact of waiver is a question for the jury."

Coursin v. The Pa. Ins. Co. 46 Pa. Supreme Court 323 (1863).

"Notwithstanding a stipulation in a policy of insurance that nothing less than an express agreement, indorsed thereon, shall be construed as a waiver of any of its conditions, parol testimony is admissible to show a waiver by acts in pais of the insurance company.

McFarland v. Kit. Ins. Co. 134 Pa. 590 (1890).

H.

The burden was on the insurance company to show that blasting powder, which was not among the prohibited articles named in the condition, was of the same nature, as dangerous and inflammable, as dynamite and gunpowder, and if the same as gunpowder that a quantity in excess of twenty-five pounds was kept on the premises.

"A policy of insurance contained a condition, 'that, if the assured shall . . . keep, have or use camphene,

spirit gas, or any burning fluid, or chemical oils, without written permission in this policy, then, and in every such case this policy shall be void . . . .'"

"As the use of benzine was not prohibited in terms it was a question of fact for the jury whether it came within the description of burning fluids or chemical oils; and in the absence of proof it is not a matter of which the court will take judicial notice."

"A small portion of carbon oil had been used at the same time with the benzine in cleaning the machinery. It was not among the prohibited articles named in the condition; not having been shown that it was of the same nature as camphene and spirit gas the court cannot take judicial notice of it."

"There was no proof that benzine was of like nature with camphene or spirit gas. It is not a matter of which the court will take judical notice. It is a question of fact, to be found by a jury upon evidence."

Mears v. Humboldt Ins. Co. 92 Pa. Supreme Court 15, 19 (1879).
Wood v. Northwestern Ins. Co. 46 N. Y. 421.

I.

The universal rule of legal construction and interpretation that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality is decided and supported by the following cases:

Sandinan v. Breach 7 Barnwall & Cresswell, King Bench Reports, p. 100.
Brooks v. Lord Kensington 14 Eng. Ruling Cases 723.
Alabama v. Montague, 117 U. S. 602.
U. S. v. Pounds of Celluloid 82 Fed. Rep. 627.
Newport &c. Co. v. U. S. 61 Fed. Rep.

488.
Crystal Sp. Distillery Co. v. Cox 49 Fed. Rep. 555.
Erwin v. Jersey City 60 N. J. Law 145.
Livermore v. Freeholders of Camden Co. 29 N. J. Law 247.
King v. Thompson 87 Pa. State 369.
Rennick v. Boyd 99 Pa. State 555.
Pardee's App. 100 Pa. State 412.
Bucher v. Com. 103 Pa. State 528.

POINT IX.

A writ of certiorari should issue to the Circuit Court of Appeals for the Third Circuit to certify to this court for its review and determination the case of St. Paul Fire & Marine Insurance Company, Plaintiff in Error, against Mrs. Annie E. Penman, Defendant in Error.

FREDERIC D. MCKENNEY,
A. J. TRUITT,
B. M. CLARK,
Counsel for Petitioner.

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FREDERIC D. MCKENNEY,
A. J. TRUITT,
B. M. CLARK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 598

ANNIE E. PENMAN, DEFENDANT IN ERROR AND PETITIONER,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM, STATEMENT, AND BRIEF IN SUPPORT OF THE PETITION.

This is an action in assumpsit upon a fire insurance policy issued by the St. Paul Fire and Marine Insurance Company in favor of the petitioner, Penman.

The suit was begun by the insured, Penman, in the Court of Common Pleas of Jefferson County, Pennsylvania, and was removed, on the ground of diverse citizenship, to the Circuit Court of the United States for the Western District of Pennsylvania, by petition of the defendant Insurance Company.

The policy upon which plaintiff's action was based contained the following clause, towit:

> "This entire policy, unless otherwise provided by "agreement indorsed thereon or added hereto, shall "be void * * * if (any usage or custom of trade "or manufacture to the contrary notwithstanding) "there be kept, used or allowed on the above-de-"scribed premises benzine, benzole, dynamite, ether, "fireworks, gasoline, Greek fire, gunpowder, exceed-"ing 25 pounds in quantity, naphtha, nitro-"glycerine, or other explosives."

The premises covered by the policy were totally destroyed by fire. Requisite proofs of loss were furnished by the insured, but the Insurance Company refused to pay, and in the course of the suit set up by way of defense that immediately before the occurrence of the fire "there was kept * * * on the insured premises *blasting powder* or some other explosive *differing* essentially from *gunpowder*."

At the trial it appeared from the evidence that the insured premises at and immediately before the fire in question were occupied by tenants who were engaged in the occupation of mining coal at Elk Run shaft, in the Borough of Punxsutawney, Jefferson County, Pennsylvania, and that two or three cans of *blasting powder* were kept in said houses, and that all of these cans had been opened and a portion of the powder used, *the amount remaining therein being unknown;* that one of the occupants of said building accidentally threw a lighted squib into one of these cans containing powder, and thereupon an explosion took place, followed by a fire which destroyed the insured premises.

Plaintiff's evidence tended to show that blasting powder was a lower degree of explosive than gunpowder; that the said insured premises were located in the bituminous coal region of western Pennsylvania, and that the powder used in that region was the common ordinary blasting powder; that it was customary for all miners to keep cans of blasting powder in their houses, and that such custom was and

had been a well-known fact throughout the mining region of western Pennsylvania, and that the laws of Pennsylvania prohibited the taking of blasting powder into the mines except in small quantities, and that therefore it became necessary for each miner to keep his blasting powder in his dwelling-house; that the explosion did no material damage of itself to the building; that the house was not wrecked, nor did it fall down from the result of the explosion; that at the time the fire started the building was intact; that the agent of the respondent, who lived at Punxsutawney, Pennsylvania, in the mining region and had years of experience in insuring this class of property, knew at the time he placed the insurance on said premises that it was to be occupied by tenants whose occupation was mining, and that he further knew there would be kept in this house *blasting powder, and that by reason of the increased hazard he charged an extra premium*, and that thereafter a special agent of the respondent came and inspected the risk, and stated that he was satisfied and thereby approved the same.

No evidence was introduced by either party showing or tending to show that blasting powder was the equivalent or greater in inflammability, power, or danger than gunpowder or any other prohibited explosive enumerated in the policy.

Uncontradicted evidence also tended to show that the policy in suit was negotiated, made, executed, the consideration therefor paid, and the policy itself delivered, all within the State of Pennsylvania, thus constituting a Pennsylvania contract, to be governed and determined in all respects by the laws of that State.

The trial judge, over the objection of the defendant company, permitted the insured, by the testimony of a Mr. Brown, who was the agent of the company and who on its behalf solicited and negotiated the insurance policy sued on, to prove that at the time of accepting said insurance he knew that the building which he was insuring was to be occupied by miners, and that he also knew of the custom of the miners, in that and the neighboring regions of the State,

to keep *blasting powder* in their houses, and because of such knowledge he had, as was customary, charged the insured, Penman, a higher rate of premium for her policy than would otherwise have been charged.

The trial judge submitted the case to the jury in a comprehensive charge, the portions of which material here are as follows:

> " Now, gentlemen, it is alleged that blasting powder was included among these articles by the term, " 'or other explosives.' Ordinarily it is the duty of " a court to construe a written instrument and instruct the jury what the terms mean. But in this " case, under the facts and the proofs here, bearing " in mind the words of the policy and the testimony " of Mr. Brown in reference to this property being " used as a miner's house, and the testimony that the " miners are in the habit of keeping blasting powder " on the premises, and also the testimony in regard " to the fact that an extra charge (if such be the case) " was made in this case by reason of the fact that it " was a miner's residence, we have decided to leave to " you, as a question of fact for you to determine, " whether, under the evidence and the facts proven " here, blasting powder is included in the term 'other " explosives.' In other words, whether it was the " intention of the Insurance Company, when it issued " this policy through Mr. Brown, to provide therein " that if blasting powder was kept, used or allowed on " the premises, the policy was to be void, and of no " effect.
>
> " If you find, gentlemen, under the evidence in " the case, that the term 'blasting powder' was not " included as one of the excepted articles under this " policy, it then becomes your duty to inquire fur- " ther in the case. If you find it was, and that it " was one of the prohibited articles in this policy, " then, unfortunately as may be the situation for " the plaintiff in this case, she is not entitled to re- " cover, because the rights of the parties must be " founded on their contract rights, and not on sym-

"pathy or good will or feelings of kindness towards "people who have suffered a loss of this kind.

"If you determine that question, that blasting "powder was not one of the prohibited articles, we "then pass on to consider the next question. The "company says that this loss was caused by an ex- "plosion. And we turn to the policy to see what the "effect of an explosion is. The policy provides that "the company shall not be liable for thus and so, or "unless fire ensues, and, in that event, for the dam- "age done by the fire only, and not that done by the "explosion. If there was an explosion in this case, "and a fire ensued as the result of that explosion, the "company is not liable for the damage that was done "by the explosion, but only for the damage which "was caused by the fire which ensued after the ex- "plosion. It will be for you to determine that fact "whether there was an explosion here, and if so, you "will only charge the defendant, in case you find in "favor of the plaintiff, for the loss that was occa- "sioned by the fire after the explosion, and not for "the damage that was done to the property by the "explosion itself."

The jury, having deliberated, returned a verdict in favor of the plaintiff for $2,756.00, and judgment was duly entered in accord therewith.

The Insurance Company sued out a writ of error from the United States Court of Appeals for the Third Circuit, and the cause having been heard there, the judgment of the trial court was reversed, the judges of the appellate tribunal dividing among themselves, Gray and Lanning, JJ. voting for the reversal and Holland, J., dissenting.

The majority judges appear to have held that it was reversible error on the part of the trial judge to have admitted the evidence of the insurance agent Brown above referred to, on the ground that as matter of law—

"the policy in suit prohibited the keeping of blasting "powder on the insured premises, that parol testi-

"mony was improperly admitted to vary the terms "of the policy, and that the trial court should have "directed a verdict for the defendant in accordance "with its request."

In his dissenting opinion, Holland, J., said:

"The explosives which the policy says shall not "be kept, used or allowed on the premises' are "benzine, benzole, dynamite, ether, fireworks, gaso- "line, Greek fire, gunpowder, exceeding twenty-five "pounds in quantity, naphtha, nitro-glycerine, or "'other explosives.' This must be held to mean "other explosives in the class previously mentioned "and of a nature as inflammable and dangerous as "the specified class, but it was not intended by the "parties that 'other explosives' should extend to other "articles of a much lower explosive power, which in "no sense could be classed among those dangerous "and highly explosive articles. It is manifest that "the lower explosives not named were not intended "to be prohibited, because following the words "'other explosives,' the policy specifies such of a "lower explosive quality which are intended to be "excluded, to wit, phosphorus or petroleum, or any "of the products of petroleum, of greater inflamma- "bility than kerosene oil of the United States stand- "ard. In other words, the policy specifies a number "of violent and dangerous explosives which are pro- "hibited upon the premises, and adds other ex- "plosives, meaning other explosives of their nature "and kind; and then follows a list of a lower degree "of explosive power which the insurer elects to ex- "clude from the premises. These are also specified, "but nowhere do we find there is any exclusion of "blasting powder. From an examination of the "whole policy, it is very plain that this is the proper "interpretation to be given to the expression 'other "explosives.' It was evidently so intended by the "insurer, as, in another paragraph, it provides for "extent of its liability where fire ensues from an ex- "plosion of any kind, by limiting it to the damages "done by fire only. Now, it must have been the

"understanding of the insurer that as all kinds of "explosives were not excluded from the premises, "there might be destruction of the property result- "ing from the explosion, and, in that case, the policy "provides that its liability shall only extend to the "damage caused by fire only, if fire should ensue. "This provision indicates that the plaintiff in error "did not expect the premises to be kept free from "explosives, excepting those particularly specified "and those of the same class, and that in case other "explosives not excluded from the premises were al- "lowed thereon and an explosion occurred, that the "company's liability should only extend to the dam- "age done by fire alone. In accordance with the "general rule that provisions relating to forfeiture "should, when ambiguous, be so construed as to pre- "vent forfeiture, the courts have, as a rule, con- "strued the condition as to the keeping and use of "hazardous articles upon insured premises liberally "in favor of the insured whenever there is an am- "biguity in such condition."

* * * * * * *

"The rule of legal construction that general words "following an enumeration of particulars are to have "their generality limited by reference to the preced- "ing particular enumeration, and to be construed as "including only all other articles of the like nature "and quality, is usually applied to statutes giving to "certain classes special privileges, and those inflicting "a penalty or forfeiture; also to provisions in con- "tracts intended to work a forfeiture; and especially "is it rigidly adhered to in insurance agreements con- "taining provisions in which general words follow "particular enumerations and are inserted in clauses "for the purpose of working a forfeiture of the agree- "ment. This is the rule universally adopted by the "courts. * * *

"These are a few of the cases illustrating the appli- "cation of the *ejusdem generis* rule of interpretation "of statutes, and is applied, for the same reasons, with "like effect in the construction of contracts * * * "especially in policies of insurance to clauses intended "to work a forfeiture against the insured. The use

"of words and phrases, the scope and extent of which "are uncertain and indefinite, is not to be encouraged "in contracts, and especially should they be avoided "in contracts of insurance in which the law holds "both parties equally bound to the provisions of the "writing, when, as a matter of fact, as a rule, the in- "sured is either entirely ignorant of all the terms of "the policy, or is possessed only of a vague informa- "tion of their extent and meaning. The insured, "notwithstanding, is, as a matter of public policy, "presumed to know and required to observe every "covenant and requirement contained in the policy. "The policy is so skillfully drawn by the insurer, "who is not only presumed to know but who, as a "rule, actually does know the existing conditions "and uses of the property insured. It is therefore "no hardship to insist that provisions therein con- "tained, calculated to work a forfeiture, shall be spe- "cific and certain, especially should this be required "in prohibiting the use of keeping hazardous articles "upon the premises, and to allow the use and keeping "of such only to work a forfeiture as are expressly "prohibited. The fact that a great variety of ex- "plosives are constantly used by the people in all "walks of life, for various purposes, is the strongest "argument against the injustice of construing the "catch-all phrase 'other explosives' in this policy in "the broad and comprehensive sense. The old-fash- "ioned gun-cap and the heads of some matches in "every-day domestic use are 'explosives,' and though "of such infinitesimal hazard as to warrant the as- "sumption that they were not to be regarded as in- "cluded in 'other explosives,' yet if they are not to "be included in 'other explosives,' of what degree of "hazard and difference of explosive force shall indi- "cate where the line shall be drawn, if we stop short "of insisting that 'other explosives' shall mean ex- "plosives of a like kind, nature and hazard of those "particularly specified. And why not insist upon "this rule of interpretation? The insurer writes the "policy, and it is a very simple matter to prohibit "the use of an article on the premises by name and "by use of general words, all of its class and kind.

"The evidence shows that it has been the custom

"and usage among the miners in the coal mining dis-
"trict of Pennsylvania to keep blasting powder upon
"the premises. The act of 1893 of this State prevents
"these workmen from taking quantities of this
"powder in the mines, and in order that they may
"continue in the work of coal mining, it is necessary
"for them to have a safe and dry place to keep their
"powder. These industrial conditions necessitated
"the practice of keeping small quantities of blasting
"powder upon miners' premises, which has long
"since grown into a custom. Neither the practice nor
"the existence of the custom is disputed, by the In-
"surance Company.

"The company's agent who took this insurance
"has lived in the mining district for upward of
"twenty-three years; he has represented this Insur-
"ance Company for more than six years, and for
"which company he has been insuring miners' tene-
"ments in this vicinity. The plaintiff in error not
"only did not attempt to produce evidence to con-
"tradict the proof of this universal habit of keep-
"ing blasting powder upon the premises, but did
"not even cross-examine the numerous witnesses
"called to establish the fact, and the defendant in
"error showed by the company's agent that he, in
"this case, actually charged and collected from Mrs.
"Penman a rate nearly double the usual rate for
"tenement-house insurance, and that the extra
"amount collected was to compensate the insurance
"company for the additional risk it was to assume
"in insuring the property against the risk of keep-
"ing blasting powder on the premises.

"With this knowledge of a hazard, for which the
"company was paid to assume and which had grown
"into a custom long known to its agent, against
"which it could have so easily protected itself in
"its policy by inserting the words 'blasting pow-
"der,' if it intended to exclude it, it has no just
"ground whatever for now insisting upon forfeiting
"the policy upon an indefinite and general use of
"terms. There can be no other view, however, than
"that blasting powder was never intended to be cov-
"ered by the expression 'other explosives.'"

* * * * * * *

"The property here insured was located in the "State of Pennsylvania. The policy was made and "delivered here, where the contract is to be per- "formed. It is, therefore, a Pennsylvania contract "and to be interpreted by the laws of this State, "which laws, however, so far as applicable to the "facts of this case, do not differ from the law as "found in the text books and decisions of courts of "last resort in other jurisdictions."

* * * * * * *

"It is conceded to be a binding rule that 'in courts "of law the written contract shall be regarded as "the sole repository of the intentions of the parties, "and that its terms cannot be changed by parol "testimony,' but, in the trial of this case, this prin- "ciple was not in the least violated, nor was the "parol testimony admitted for the purpose of vary- "ing the terms of the policy, as we view the case. "Certain hazardous explosives, specifically named, "were prohibited from being kept or used upon the "insured premises. Blasting powder was not named, "but following the enumeration of the explosives "excluded, the phrase 'other explosives' was used, "and notwithstanding the fact that blasting powder "was not in terms excluded, it is now held by the "plaintiff in error that blasting powder was excluded "under the general terms 'other explosives.' The "parol testimony was admitted, not for the purpose "of varying the terms of the contract, but for the "purpose of showing that blasting powder was not "an 'explosive' of the same kind as those enumerated, "but was one of much lower explosive force, and that "it was a custom, arising out of the necessity of the "coal-mining business, for miners to keep blasting "powder, in small quantities, for use in the mines, "upon their premises, and that the Insurance Com- "pany knew this custom prevailed in this commu- "nity long before and at the time this insurance was "effected, and that it knew these houses were to be "tenement-houses in this mining district where the "custom prevailed, and that the company, through "its agent, Brown, collected an additional premium "for the risk resulting from the recognized and

"known custom of keeping blasting powder upon "the premises. Blasting powder not having been "specifically excluded, as I shall show hereafter, it "was proper to admit the evidence for the purpose of "ascertaining the understanding of the parties to the "contract at the time it was executed.

"This judgment should be affirmed for two rea-"sons:

"First. This being a clause in an insurance policy, "the language of which tends to work a forfeiture, "should be construed most liberally in favor of con-"tinuing the insurance, and the general words 'other "explosives' should be restricted to explosives of a like "kind and degree of hazard as those previously enum-"erated and with which the parties are associated, "and as 'blasting powder' by name is not prohibited "upon the premises and falls within the class of pro-"hibited articles only in case the general expression "'other explosives' under the circumstances can be "said to include it, the court, before passing upon "this question, must know the nature of 'blasting "powder' and any other fact or circumstance show-"ing the intention of the insurer as to the relation "of this indefinite phrase to the subject-matter of "the insurance.

"Second. 'Blasting powder' not being expressly "prohibited upon the premises, the defendant in "error was entitled to show the notorious and long "established custom in this mining district for ten-"ants to keep 'blasting powder' in their houses, in "reasonable quantities, for use in the mines, which "practice was known to the insurer's agent who col-"lected a premium for this risk, and having estab-"lished those facts by uncontradicted testimony, the "court should have instructed the jury that the "keeping of blasting powder upon the premises, as "shown in this case, did not forfeit the insur-"ance." * * *

It is asserted here that the effect of the ruling of the majority judges of the Circuit Court of Appeals, if permitted to stand, will be to establish in the Federal courts of the State of Pennsylvania a precedent with respect to a

Pennsylvania contract which is at variance with the laws of that State as established by the decisions of its judicial tribunals.

In addition to this circumstance, the instance case presents a question which, as applied to the policy in suit and the circumstances under which it was issued, which circumstances include the fact that the insured actually paid, and the insurer actually received, a higher rate of premium because of the special risk involved, is, in so far as this court is concerned, of novel impression, and its great importance to a very considerable portion of a very hard-working and by no means plutocratic community is readily apparent.

It appears from the petition for the writ of certiorari that the defendant Insurance Company has been doing business in the mining district in question for more than twenty years; that it has outstanding, on precisely similar property, similarly inhabited and involving the same or similar risks, thousands of policies, which are being renewed from year to year, and for which the insured, by reason of the extra hazards involved and understood to flow from the general occupations of the denizens of said district, pays, and the company collects, as it did from Mrs. Penman, a rate of premium "nearly double the usual rate for tenement-house insurance."

The extra rate paid to and collected by the Insurance Company was paid and collected as compensation for the additional risk which the company was understood, both by the insured and its agent, who acted in this regard on its behalf, to have assumed "in insuring the property against the risk of keeping blasting powder on the premises."

Having enjoyed the extra premium which was paid to cover the extra hazard involved, and a loss having occurred,

it would seem to be inequitable and legally unjust that a technical rule of evidence should be so applied and enforced as to compel the burden of the loss to be borne by the parties least able to bear it.

For a more extended and elaborate treatment of the point of law involved and its general effect and importance to the community concerned in its rightful and final determination, reference is made to the petition itself and the main brief filed in support thereof.

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Attorneys for the Petitioner.

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IN THE

Supreme Court of the United States.

~~No. 628~~ 67

No. ~~628~~ OCTOBER TERM, 1907.

MRS. ANNIE E. PENMAN,
Defendant in Error and Petitioner,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Plaintiff in Error and Respondent.

BRIEF OF RESPONDENT.

ON PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

W. K. JENNINGS,
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The Myers & Shinkle Co., Print, 711 Liberty Street, Pittsburgh.

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MRS. ANNIE E. PENMAN,
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Plaintiff in Error and Respondent.

ARGUMENT.

The only authority the petitioner has for asking the court to issue a writ of certiorari is in the provisions of Section 6 of the act of Congress entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3, 1891, which is in substance as follows: That any case in which the judgment of the Circuit Court of Appeals is made final may be required by the Supreme Court by certiorari or otherwise to be certified to it for review and determination as if it had been brought there on appeal or writ of error. In November, 1891, in construing this section Mr. Chief Justice Fuller, in delivering the opinion in the case of Lau Ow Bew, 141 U. S. 583, used the following language: "It is evident that it is solely questions of gravity and im-

portance that the Circuit Courts of Appeals should certify to us for instruction; and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final to be certified can be properly invoked. The inquiry upon this application, therefore, is whether the matter is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error," and added, "While, therefore, this branch of our jurisdiction should be exercised sparingly and with great caution, we are of opinion that the grounds of this application are sufficient to call for our interposition." This was followed by the case of Woods vs. Lovejoy, 143 U. S. 202, in which the Chief Justice cited the Lau Ow Bew case as holding that the power of this court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified for review and determination as if it had been brought here on appeal or writ of error, could only be properly invoked under the section above mentioned, when questions of gravity and importance were involved, and added, "This must necessarily be so in any view, and especially when it is considered that the Circuit Courts of Appeals were created for the purpose of relieving this court of the oppressive burden of general litigation which impede the examination and disposition of cases of public concern and delay suitors in the pursuit of justice. But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

In the case under consideration the court held that the matters involved did not fall within the category of questions of such gravity and general importance as to require

the review of the conclusions of the Circuit Court of Appeals in reference to them. The writ was therefore denied.

The court had this same question under consideration in the case of American Construction Company vs. Railway Co., 148 U. S. 372 (decided March 27, 1893), and Mr. Justice Gray in delivering the opinion of the court said: "In the same spirit, the authority conferred on this court," (by the section above mentioned), "has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision * * * * *. Accordingly, while there have been many applications to this court for writs of certiorari to the Circuit Court of Appeals under this provision, two only have been granted: the one in Lau Ow Bew's case above cited, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, * * * * which presented an important question as to the rules of navigation."

A later case is that of Forsyth vs. Hammond, 166 U. S. 506, (decided April 19, 1897). Mr. Justice Brewer delivered the opinion in which he referred to the previous decisions and said that up to the time of the passage of the act of 1891 the theory of Federal jurisprudence had been a single appellate court, to-wit: the Supreme Court of the United States. He referred to the rapid growth of the country and the enormous amount of litigation as having caused the creation of the nine circuits of an appellate tribunal composed of three justices whose decision in certain classes of cases applicable thereto should be final. While this revision of appellate power was the means adopted to reduce the accumulation of business in this court it was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might, by their difference of opinion, unless held in check by the

reviewing power of this court, create an unfortunate confusion in respect to the rules of Federal decision.

Upon a careful consideration of the principles laid down in the citations above given it would seem that in order to induce the court to exercise the power to issue a writ of certiorari there must be some one or more of the following requisites:

First: Such radical differences of opinion between circuit courts of appeal as would create an unfortunate confusion in respect to the rules of Federal decision.

Second: Such differences of opinion between courts of appeal and the courts of a state or some matter affecting the interests of this nation in its internal or external relation which demand such exercise.

Third: These matters must be questions of great gravity and importance.

The third rule above mentioned qualifies the other two. The nine appellate tribunals would be more than human if they could harmonize with each other in all their decisions. In fact no courts have been able to harmonize all their own decisions. The applicant for a writ of certiorari, therefore, must show that the matter is of such importance that it calls upon the Supreme Court to intervene to prevent the unfortunate confusion above mentioned and that is why the court has said that it has been chary of action under the act of 1891 because otherwise the calendar of the court would be loaded down with business exactly as it had been before the passage of the act. This thought is expressed in another way by the Supreme Court in the same case, viz: "Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation."

It appears to us that there is still a further distinction in these opinions of the Supreme Court, viz: that the differ-

ences between United States Courts and the State Courts should not be mere opinions on abstract questions of law which might afterwards be cited as authority in the tribunals deciding the questions or in other tribunals, but that there must be some actual conflict or difference of opinion as to the exercise of jurisdiction in regard to the same subject-matter. For instance, in the case of Forsyth vs. Hammond (Supra) the Supreme Court of Indiana had declared, "that the proceedings by which the contiguous territory was annexed to the city of Hammond were legal and, therefore, that the territory was to be considered by all the officers of the State of Indiana as within the territorial limits of the city. The United States Circuit Court of Appeals by its decision in this case had declared that such annexation proceedings were invalid, and that the property of this petitioner was not within the city limits." This was evidently a concrete question and touched upon a very delicate and long disputed matter, viz: national and state rights. It is very clear, therefore, that the highest tribunal in the land should have the final decision in such matters, and it is a fair illustration of what the Supreme Court meant in speaking of matters of grave and weighty importance. Within the last few months there has been much friction between the state and national officials in one or two southern states over railroad matters, which might have resulted in bloodshed, and every consideration, therefore, in regard to the peace and dignity of national government, as well as the state authorities, would require that such matters should be referred to the court possessing the highest authority. But we have not heard of any uprising on the part of the populace, or of either of the state or national officials, because the Circuit Court of Appeals of the Third Circuit rendered a decision in the case at bar which might possibly be in conflict with some opinion handed down by the Supreme Court of the State of Pennsylvania. We are speaking by way of illustration because we deny that there was any such conflict, and aver that the plaintiff's brief has not proven that there was.

Indeed, as we think, if the court had decided otherwise than it did, it would have brought itself into conflict with the Supreme Court of the United States. But if it had, we would be obliged to concede that we would have been remediless, because we believe that no writ of certiorari could have issued for our benefit.

It seems to us that the case at bar does not exhibit any of the requirements above mentioned. It was a case between private parties, and of no public interest whatever, involving the construction of a clause in a policy of insurance of the standard form. This form of policy contains stipulations and conditions covering one hundred and twelve printed lines and it may be said that their name and the name of the decisions bearing thereon is literally legion. If this court is to grant a writ of certiorari in every instance in which any Circuit Court of Appeals should in its decisions differ from any similar court, or any state court, in regard to the proper construction of the standard policies of insurance as to any one or more of the conditions or stipulations thereof, then the beneficial effect of the act of 1891, so far as relief to the Supreme Court is concerned, would be entirely lost.

So far we have not touched upon the merits of the case at bar. The counsel for the petitioners seem to think that the fact that there was a dissenting opinion in the Court of Appeals is a proper warrant for the granting of the writ. In a case of sufficient gravity and importance which was public in its nature and contained the other elements above mentioned, no doubt the fact that there was a dissenting opinion would have weight with the Supreme Court, but where these elements are lacking, the dissenting opinion of a District judge sitting as a member of the Circuit Court of Appeals, would not be entitled to any more weight than the opinion of the learned judge of the Circuit Court whose judgment was reversed by the Circuit Court of Appeals. To take any other position would be to assert that in every case where there was a reversal there was a difference of opinion between the appellate

court and the court of inferior jurisdiction, which would warrant the issuing of a certiorari. To state this proposition is to answer it.

It is hardly worth while in a brief of this character to discuss the merits of the case under consideration except in so far as the same might have a bearing upon the matters heretofore presented. The petitioner's counsel in their brief have presented nine different points. Of these the second, fourth, sixth, eighth and ninth appear to us to be immaterial. We have already endeavored to answer the first, third and seventh, and will try to reply to the fifth hereafter. In regard to the eighth point we admit the large number of citations, but deny their relevancy.

Our case may be briefly stated as follows:

First: The policy of insurance (vide page 7 of the record) contained the following clause *inter alia*:

> "Mrs. Annie E. Penman $2600.00 on a two-story frame, shingle-roofed building 28x96 and additions, now in process of erection, with privilege to finish, *to be occupied by tenants as dwellings*, situate in Elk Run Addition to Punxsutawney, Elk County, Pennsylvania." * * * * "In consideration of an extra premium of $3.90, 30 days' permission is hereby granted to finish building."

It will be observed that the policy showed upon its face that the building was not yet finished and that it was to be occupied by tenants as a dwelling. The testimony showed that it was not rented at the time nor for some time afterwards, that neither the agent nor any other person knew who the tenant was to be, or what his occupation might be, and yet the petitioner claimed in the trial court that the agent of the company was presumed to know that the tenant would be a miner because it was in a mining district, and if perchance he should happen to be a miner that he would follow the pernicious and dangerous custom of other miners of keeping blasting powder upon the premises. (See pages 69, 75, 76 and 77 of the record). In this there was an attempt to base a presumption upon a presumption which the law will not permit. In the case of Douglass

vs. Mitchell's Executors, 35 Pa., 440, the Supreme Court of Pennsylvania held that "whenever circumstantial evidence is relied upon to prove a fact the circumstances must be proved and not themselves presumed. No presumption can be drawn from a presumption; if there be no fixed or ascertained fact from which the inference of another fact may be drawn, the law permits none to be drawn from it." To the same effect is Philadelphia City Pass. Ry. Co. vs. Henrice, 92 Pa., 431.

Second: The appellate court held that the trial court had erred in admitting parol testimony to vary the terms of the policy. (See majority opinion p. 117 of the record). The decision of the court in this respect was based upon the case of Assurance Co. vs. Building Association, 183 U. S. 308.

Third: The clause in the policy in relation to the proper construction of the words "or other explosives" is so well discussed in the majority opinion on pages 115 and 116 of the record that nothing further needs to be said by us. We desire to call attention, however, to the fact as shown in the testimony of Frank Moronose, on page 51 of the record, that immediately before the explosion took place which caused the fire, there were three men engaged in taking blasting powder from as many open kegs in the dwelling house and putting it in tubes for use in the mines and the tenant and the other men were throwing lighted caps or squibs in the air for fun, when one of them fell into an open keg causing an explosion killing four persons and setting fire to the house. The witness himself was so badly burned that he barely escaped with his life. We are unable to see that the plaintiff's petition or the facts as shown in the record or in the majority opinion or the dissenting opinion disclosed any matters of sufficient gravity or importance to lead the court to order a certiorari to be issued.

Respectfully submitted.

W. K. JENNINGS,
D. C. JENNINGS,
Counsel for Respondent.

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 67.

MRS. ANNIE E. PENMAN,
Petitioner,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT.

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Of Counsel.

Supreme Court of the United States.

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MRS. ANNIE E. PENMAN,

Petitioner.

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

This was an action at law brought to recover upon a policy of fire insurance as written. The policy contained the following specification or description of the property insured:

> "$2,600.00.
>
> On the two-story, frame, shingle roof building, 28x96 feet and additions, now in process of erection, with privilege to finish, *to be oc-*

cupied by tenants as dwellings, in Elk Run Addition to Punxsutawney, Jefferson County, Pennsylvania.

Permission to use natural gas for fuel and lights.

Lightning clause attached.

Loss, if any, first payable to Louis Wester, as his interest may appear.

In consideration of an extra premium of three and 90/100 dollars, thirty days' permission is granted to finish building" (p. 5).

The policy was a printed form commonly known as the New York Standard Form, and in use in the State of Pennsylvania. It contained the following provision:

> "This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if * * * (any usage or custom or trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gun-powder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorous or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be had for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by day-light, or at a distance not less than ten feet from artificial light)" (p. 67).

The policy also contained the following provision:

> "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agree-

ments or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached" (p. 10).

The defense was based on a violation of the clause prohibiting the keeping, using or allowing of explosives upon the premises.

It was conclusively established by the evidence that some of the tenants were miners; that for some months prior to the fire they habitually kept kegs of blasting powder upon the premises; that at the time of the explosion which resulted in the destruction of the property at least three open kegs of blasting powder were in one of the rooms where the men were engaged in filling flasks with the powder to be taken into the mine. One of the men was amusing himself by lighting squibs or fuses and throwing them into the air, and one of the lighted squibs fell into one of the open cans of powder. The result was an explosion (p. 35-39). As the powder was not confined, the concussion was not particularly violent, but was noticeable by outsiders at some distance from the building (p. 15, 17, 22). The ignition of this large

mass of loose blasting powder burned to death four of the occupants of the room and the building instantly burst into a mass of flames (p. 37).

It will be noted that the policy by its terms does not state that the building was to be occupied by miners. Also that at the time of the issuance of the policy the building was not occupied or used for any purpose, being then in the course of erection.

It conclusively appears that blasting powder is a substance manufactured and used for the sole purpose of rending apart substances by its explosive force, that one of its uses is blasting in coal mines (p. 62), and that it is recognized as a dangerously violent explosive by the laws of Pennsylvania, which prohibit miners from taking more than five pounds into the mines (p. 44). Against the objection of the respondent the trial court admitted parol evidence to establish the meaning of the policy provision prohibiting explosives. The agent who had written the policy was permitted to testify (p. 47-55), that although nothing was said on the subject, he "knew" or rather supposed that it was the intention of the assured thereafter to rent the property to miners, apparently because the building was of a kind suitable for miners' tenements and because the residents in the neighborhood were principally (p. 54,) though not all, miners. He was also permitted to testify that he had increased the premium, partly because of the fact that there seven separate families were to live in the building (p. 52), and partly because

he supposed they would be miners. He was wholly unable to say what part of the increase was for one hazard and what part for the other (p. 53). This testimony consisted wholly in a description of his own undisclosed mental operations, divulged neither to the insured (p. 53) nor to the Insurance Company (p. 54). Proof was further permitted to show that it is a common practice of miners to keep considerable quantities of blasting powder in their dwellings, because on account of the dangers incident to its presence, the law prohibits taking it into the mines in quantities exceeding five pounds (p. 44). The trial court abdicated its functions (p 66) and allowed the jury to determine what the contract was, with the result usual in insurance cases. The Court of Appeals held that a verdict should have been directed for the defendant.

The questions for decision are whether blasting powder was prohibited by the provisions of the policy, and whether parol evidence was admissible to show that the parties intended to permit its use upon the premises.

ARGUMENT.

TO KEEP, USE OR ALLOW BLASTING POWDER UPON THE PREMISES WAS CLEARLY PROHIBITED BY THE TERMS OF THE WRITTEN CONTRACT.

The decisive point in this case is whether the contract, as written, prohibited blasting powder upon the premises.

Blasting powder is not specifically named in the policy, and the question is whether an explosive of that character was included in the expression "other explosives."

The theory of the petitioner and of the dissenting opinion in the court below is that because it was shown that blasting powder was of a lower degree of explosive force than gun powder (p. 62), it was not included within the term "other explosives", this result being obtained by an attempted application of the rule *ejusdem generis*, from which it is claimed that by "other explosives" was intended only explosives having the same degree of explosive force as those specifically mentioned. This argument ignores the manifest purpose of the prohibitory clause and is based on too narrow a view of the rule of interpretation mentioned. In interpreting this contract the first step is to determine from the nature of the contract the purpose for which this provision was inserted. It is manifest that the Insurance Company intended to relieve itself from those risks incidental to the presence of explosive substances of such a

character as to be seriously dangerous to life and property. Any substance, therefore, of sufficiently violent explosive properties to cause a substantial increase in hazard is within the plain purpose of the provision. That blasting powder is a substance with such qualities is made plain not only by such description of its properties as is contained in the record, but by the undisputed fact that in this particular case ignition of a quantity of the powder in a loose and unconfined condition destroyed the lives of four people and resulted in the instant destruction by fire of the insured building (p. 37, 38). The term "other explosives" was plainly intended to include substances with these qualities. A proper application of the rule *ejusdem generis* to the provisions of this contract is necessarily favorable to the respondent. A number of different explosive substances are specifically named in the contract. These substances differ greatly in their chemical qualities, and in the degree of their explosive force. Some of them are manufactured for the sole purpose of causing explosions. Others are manufactured or used for other purposes, but have the quality of causing explosions if not properly handled. The only characteristic common to all the substances specifically named is that they are liable to cause more or less violent explosions, dangerous to life and property.

It is manifest, too, that a difference in degree of explosive force is not important, provided the article will produce explosions sufficiently violent seriously to increase the hazard. Nitroglycerine, gun

powder and greek fire differ widely in the degree of explosive force which they possess, and yet are prohibited for the manifest reason that they have sufficient explosive force to cause substantial danger to life and property and seriously to increase the hazard. The rule *ejusdem generis* is a rule of interpretation intended to aid the court in arriving at the true intention of the parties, and not to pervert the fair meaning of a written instrument. No proper application of it can lead to the conclusion that the general expression "other explosives" was intended to include only explosive substances having substantially the same as or a greater degree of explosive force than gun powder. Its proper application in this case would lead simply to the conclusion that by the term "other explosives" was meant explosives having the same general characteristic as those specifically named, viz., sufficiently violent explosive force to cause substantial injury to property and seriously to increase the hazard. The further fact that the substances specifically named have varying degrees of explosive force indicates that the term "other explosives" was not intended to be limited to substances having the same degree of explosive force as any one of those specifically named. The authorities cited in support of the petitioner's attempted application of the rule *ejusdem generis* do not sustain it.

For example, in the case of Renick v. Boyd, 99 Pa. St. 555, an act of the legislature enabled an owner of realty to sustain an action of replevin to recover "timber, lumber, coal or other property

severed from the realty." The court held that the words "other property" were intended to include articles of the same generic character as those already enumerated, such as slate, marble, iron ore, zinc ore, all other forms of minerals and ores, building stone, fixtures and machinery of every description, which have been permanently affixed to the realty. We submit that there is as much similarity between blasting powder and dynamite as there is between timber, lumber and coal on the one hand, and zinc ore, building stone or machinery on the other. This case shows that the rule *ejusdem generis* means that a general expression following a specific description of articles includes other articles having the same general characteristics as those specifically named. The general characteristic common to the articles specifically prohibited in this policy is that of having sufficient explosive violence to cause substantial damage to life and property, a characteristic which it cannot be disputed belongs to blasting powder. Three classes of explosives are specifically mentioned in the policy:

1. Substances manufactured for the purpose of propelling missiles from fire arms by explosive force.

2. Substances manufactured for the purpose of rending apart other substances by explosive force.

3. Substances manufactured or used for commercial, domestic or manufacturing purposes, which incidentally have dangerous explosive properties.

"Other explosives," therefore, properly includes substances belonging to any one of these classes.

The most narrow construction which could be placed upon the words "other explosives" as used in this policy is that the expression was intended to include only articles manufactured and used for the purpose of causing explosions,—what might be termed explosives *per se*. One definition of the word "explosive" is as follows:

> "Any substance by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting or in fire arms."
>
> Century Dictionary, Explosive.

Blasting powder comes within this very limited definition. It is an article manufactured and used solely for the purpose of causing explosions and of rending apart masses of rock, earth, coal or similar substances. It must be a violent explosive to be efficient for the purpose for which it was intended. It has been recognized as a high and dangerous explosive in the statutes of the State of Pennsylvania. The statute of Pennsylvania of May 15, 1893, relative to bituminous coal mines, Art. 8, Sec. 5, P. L., provides:

> "No powder or high explosive shall be stored in any mine, and no more of either article shall be taken into the mine at any one time than is required for any one shift, unless the quantity be less than five pounds."

It appears from the evidence that the very article which caused the destruction of this building is the explosive referred to in this statute of Penn-

sylvania (p. 44). It has been recognized by law as a substance so dangerous to life and property as to require the exercise of the police power of the Commonwealth of Pennsylvania to limit its use in the mines of that state. It conclusively appears, therefore, that blasting powder is an "explosive" in any sense in which the word may be used; also that it is an extremely dangerous explosive with sufficient explosive force to rend apart masses of rock, earth or coal, and that it therefore necessarily has those qualities common to the explosives specifically named in this policy, and that it comes within the plain purpose of the prohibitory clause in the contract. That the words "other explosives" include only substances manufactured or used to cause explosions is, however, too narrow and limited an interpretation to be placed upon these words. A much broader meaning has been given to this expression by the Supreme Court of Pennsylvania.

In the case of Lutz v. Royal Ins. Co., 205 Pa. St. 159, a policy containing the same provision as the policy here involved was issued covering a building occupied by a dealer in photographic supplies. The dealer was not only selling but manufacturing blitz pulver, a flash light powder used in photography. The defense rested on the claim that flash light powder was an explosive prohibited by the policy, although not specifically named. The evidence showed merely that flash light powder was a violent explosive, dangerous to life and property. There was no proof that blitz pulver was

of any greater or less degree of explosive force than other substances specifically named in the contract, and no comparison was made or attempted to be made between its explosive qualities and that of other articles specifically named or specifically prohibited. It is manifest, further, that flash light powder is not manufactured for the sole purpose of causing explosions. In this state of the case the Supreme Court of Pennsylvania held that flash light powder was included in the expression "other explosives" on mere proof that it was likely to cause explosions dangerous to life and property, without any reference to a comparative degree of explosive force.

In United Life, Fire & Marine Ins. Co. v. Foote, 22 Ohio St. 340, the policy provided that the insurer should not be liable for loss resulting from any explosion whatever, "whether of steam, gunpowder, camphene, coal oil, gas, nitroglycerine, *or any explosive article or substance.*" If the application of the rule *ejusdem generis* urged by the petitioner be sound, then no explosive article or substance not specifically named in the limitation of liability came within the limitation, unless shown to be of as great explosive force as those named, and yet the Court held that the insurer was not liable for loss caused by an explosion of vapor evolved in the rectification of liquor, *although the policy expressly authorized* the use of the premises for that purpose.

In the dissenting opinion much is made of the

fact that not exceeding twenty-five pounds of gun powder were permitted by the terms of this contract, and it is urged that as blasting powder was shown to have a less degree of explosive force than gun powder, blasting powder was not intended to be prohibited. Such an inference is not justified. The reasons for permitting limited quantities of gun powder, even though it be of a higher degree of explosive force than other prohibited articles, is manifest. Gun powder may be said to be a common household article throughout the United States. It is found in some form or other in almost every household. The people are familiar with its qualities and accustomed to its use, and use it only in particular ways, and for those reasons it may in reality be less dangerous than other forms of explosives having less explosive force. The presence of a limited quantity of gun powder, therefore, is almost a necessary risk to be assumed. A company could not do business without permitting it, and it is to be presumed that it is one of the risks which enter into their calculations. The fact, therefore, that they are willing to assume such risk under these circumstances does not justify the inference that they intend to assume the risk incident to the presence of blasting powder, or other explosives of less explosive force than gun powder.

In every state are found statutes regulating or prohibiting the keeping of explosives. These statutes define what is meant by explosives, and usually except gun powder. One such statute defines

"explosive" as follows:

> "Guncotton, nitroglycerine, or any compound thereof, and any fulminate, or any substance intended to be used by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder."
>
> 1 Mass. Rev. Laws 1902, p. 880, c. 102, sec. 105.

Another as follows:

> "Guncotton, nitroglycerine, or any other compound of the same; any fulminate or generally any substance intended to be used by exploding or igniting the same to produce a force to propel missiles or to rend apart substances, except gunpowder."
>
> S. C. Civ. Code 1902, sec. 2156.

Such statutes therefore use the word "explosive" as including blasting powder. The reasons for the prohibition of explosives by such statutes are the same that move insurance companies to prohibit them in their policies. It will be noted also that these statutes except gunpowder, manifestly for the same reason that insurance companies do, not because it is not a violent explosive, but because people insist on having it. In a criminal prosecution under one of these statutes for keeping blasting powder, the defense that the statute did not include blasting powder because of lower degree of explosive force than gun powder, a permitted article, would not be tolerated, even under the strict rules of interpretation applied to criminal statutes.

It appears, therefore, that the word "explosive," as used in statutes intended to cover even a more limited class of explosive substances than the prohibition in the insurance policy, commonly includes blasting powder; also, that although gun powder is not prohibited by these statutes, explosives of less power are prohibited.

It is suggested in the dissenting opinion (p. 85) that as the policy contains a provision that in case of explosion the company shall only be liable for loss resulting from ensuing fire, thus contemplating the possibility of explosion, the inference follows that the company expected that explosives would be kept or used, and therefore blasting powder was permitted. The policy, however, does permit certain explosives such as gun powder in limited quantities, and natural gas, and it may be assumed that explosions might occur from the use of these articles, or from other substances not prohibited.

There is nothing in the description of the property of the insured, nor in the uses to which it was to be put as stated in the policy, which in any way could be construed as a permission to use blasting powder on the premises. The policy did not state that the building was to be occupied by miners or that it was to be occupied by miners who should have the right to follow their usual custom and keep substances common to miners upon the premises. It merely stated that the building was to be used by tenants as dwellings. To hold, therefore, that this contract did not prohibit the keep-

ing, using or allowing of blasting powder upon these premises is to hold that any such policy which permits the use of an insured building as a tenement house, regardless of the class of tenants, authorizes or allows the use of blasting powder.

It will be noted that the use of natural gas was not specifically prohibited by the policy. If prohibited at all it would be so by reason of a prohibition against "other explosives." Notwithstanding that fact the parties deemed it necessary to attach a special permit authorizing the use of natural gas for fuel and lights (p. 5). We assume that natural gas is an article of common use in this locality, and yet having explosive qualities it was felt necessary to expressly permit it in order that it might not be held to be a prohibited article. If the parties intended by this contract to permit the use of blasting powder upon the premises, a simple and easy method of accomplishing that result would have been to do what was done in the case of natural gas, and attach a permit so to do.

The prohibition against the use of explosives is that explosives are prohibited

> "unless otherwise provided by agreement endorsed hereon or added hereto."

The contract plainly contemplated that such permission must be endorsed on or added to the policy if it were intended to use such articles. This might have been done either by a provision specifically mentioning blasting powder or by a statement in the policy that the building was to be used by miners as tenants, with the right to keep and use

such articles as are usual for miners to use. This, while general in its terms, would have been a sufficient permit, contemplated by the policy, and if followed by proof that it was a common practice among miners to keep blasting powder in their dwellings would have prevented this policy from being declared invalid.

It was conceded that a violation of the conditions of this policy by a tenant would have the same effect as a violation by the insured.

Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113;

Diehl v. Ins. Co., 58 Pa. St. 443.

It is also the law that the words "keep, use or allow," include even a single temporary presence of the prohibited article.

Heron v. Phœnix Ins. Co., 180 Pa. St. 257.

We submit that the only interpretation of which this policy is susceptible is that blasting powder was an article included within the words "other explosives," and was intended to be prohibited unless a permit to use or keep it was endorsed on or added to the written contract.

The argument that no other Court has held blasting powder to be an "explosive" within the meaning of this form of policy, leads only to the conclusion that in no other case have counsel had the temerity to claim that it was not.

II.

EXTRINSIC OR PAROL EVIDENCE WAS NOT ADMISSIBLE TO ALTER THE MEANING OF THE CONTRACT AS WRITTEN.

It has been held in some states that if at the time of the issuance of a policy conditions exist which, under the provisions of the policy as written, operate to make the contract void *ab initio*, evidence will be received to show that such conditions were known to the insurance agent at the time of the issuance of the policy, for the purpose of establishing a waiver or estoppel. There was at one time a conflict between the rulings of the Circuit Court of Appeals on that question, and as a result of that conflict this Court caused a writ of certiorari to be issued in the case of Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, and after an exhaustive examination of the question on principle and authority it was held by this Court that such evidence was not competent, and that its effect was to vary the terms of a written instrument by parol evidence. This Court in summing up its conclusions in that case said:

> "That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the Courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insur-

ance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, expres the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that he agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent."

That decision has since been universally followed by the federal Courts and quite generally followed by state Courts. If it is not permissible to introduce parol evidence to show the existence of facts and conditions known to the agent at the time of

the issuance of the policy, how much more reason there is for excluding parol evidence of a supposition on the part of the agent that the insured probably intends, at some future date, to commit or suffer some act violative of the provisions of the policy. The decision in the Northern Assurance Company case goes much farther than it is necessary to go to sustain the contention of the respondent in the present case. Parol evidence introduced in this case for the purpose of showing the intention of the parties outside of the written contract was not to the effect that present conditions existed, nor that blasting powder was in fact being used at the time the policy was issued, nor that the premises were in fact occupied by miners at the time the policy was issued, to the knowledge of the agent. The man who had acted as agent in the issuance of the policy was permitted to testify that he knew that when the building was thereafter completed it was to be occupied by miners, and that he knew it was the practice of miners to keep blasting powder in their dwellings, and for that reason added an extra premium for the risk. This witness testified on direct examination that he knew the building was to be so used. On cross-examination it appeared that this was a mere supposition on his part (p. 53). The insured did not inform the agent of the use to which the building was to be put. Nothing was said on the subject at the time of the issuance of the contract (p. 53). As the witness himself said, the fact that the premises might thereafter be used as a miners' dwelling did

not "enter into our calculations." It appears that the building insured was suitable for the occupation of miners, as well as for other classes of tenants; that it was located in a mining town in the vicinity of a mine, where residents were "principally" miners (p. 54), but it does not by any means appear that it was necessary to rent to miners, or that there were not any tenants of other classes available. It may be assumed that in connection with the operations of a mine there are necessarily large numbers of laborers, who do work other than the extraction of coal from the shafts (p. 47, Folio 66). It affirmatively appears that neighbors in the vicinity of this dwelling were not miners (p. 17), and so far as the evidence showed only three of the occupants of the premises were in fact employed in the extraction of coal (p. 36, 44) and one of the men who were in the room at the time of the explosion was working on the railroad (p. 35). The agent testified as follows:

"Q. Who told you that that property was to be occupied by miners?

A. I knew it.

Q. How did you know it?

A. I knew it from my experience in the business.

Q. By your own intuition, did you know it?

A. Well, yes.

Q. Mrs. Penman didn't tell you?

A. No, sir.

Q. You made no bargain with her?

A. No, sir.

Q. You didn't tell her that you increased the rate because she might possibly have that occupied by miners?

A. I didn't talk to Mrs. Penman at all.

Q. To whom did you talk?

A. To her husband, and Mr. Truitt, his attorney.

Q. Did Mr. Penman talk to you about whether or not that rate was to be increased because it was occupied by miners?

A. I don't think he did. I don't think that entered into our calculations" (p 53).

In short, this witness was permitted to testify as to a supposition on his part that the premises to some extent, at least, were probably to be used for miners' dwellings. It does not even appear that the insured at the time of the issuance of the policy intended to rent to miners. For all that appears she may have then intended to select her tenants so as to avoid the risks incident to this class of tenants.

Again, the witness Brown was permitted to testify that on account of his supposition as to the probable use of the premises, he added an extra premium. This testimony, like the other, is subject to severe criticism on its face. On cross-examination he was utterly unable to explain what additional premium was added for the supposed miners' risk. He admitted that a part of this increase, at least, was made on account of the fact that the building contained seven independent dwellings for seven independent families, and that the hazard would be increased on this account whether or not occupied by miners (p. 52). How much of this increase was added because of the number of families and how much was added on account of the fact that he supposed the occupants

would be miners he could not state (p. 53). This testimony is extremely unsatisfactory from every view point. The attitude of this witness is very similar to that of the insurance agent in the case of Kenefick v. The Norwich Union Fire Ins. Society, 205 Mo. 294, in which case, in commenting upon the testimony of the insurance agent given in favor of the plaintiff, the Court said:

> "The agent tried very hard to swear that he knew powder was kept upon the premises."

The testimony amounted to nothing more than a declaration of the undisclosed mental processes of the agent at the time of the issuance of the policy.

There is no case in the books in which a witness was permitted to explain or vary the language of a written contract by stating what he supposed in his own mind the parties intended to do. There are cases where policies of insurance definitely stated on their face that the insured premises were to be used for a particular purpose, and in such cases evidence has been admitted to show that if the building were used for the purpose stated in the policy certain substances would necessarily or customarily be used upon the premises.

In the case of Phœnix Ins. Co. v. Taylor, 5 Minn. 492, the policy prohibited the keeping of gun powder in the insured premises unless by special consent in writing on the policy. The rider attached to the policy describing the premises and insured property stated that the policy covered the stock of goods consisting of a general assortment of dry

goods, groceries, crockery, boots and shoes, and "such goods as are usually kept in a general retail store," and the Court held that it was proper to admit evidence to show that gun powder was usually kept in a retail store, and that therefore the rider attached to the policy was a sufficient consent in writing attached thereto to authorize the keeping of gun powder. In that class of cases, however, the policy itself provided for a definite use of the premises, and the only extrinsic evidence offered was that the use specified in the written contract necessarily or usually involved the keeping of certain articles. Western Assurance Co. v. Rector, 85 Ky. 294, 3 S. W. R. 415.

In the present case the parol evidence went still further. The plaintiff attempted to go outside of the policy to establish two facts, first, that the premises were intended to be used for a purpose not stated in the policy, viz., for miners' dwellings; and second, that it was the common practice of miners to keep blasting powder. There is no Pennsylvania case which holds that evidence may be introduced outside of the written contract for the purpose of showing *both that the premises were intended to be used for a purpose not specified in the contract and that such use necessarily or customarily involved the keeping of certain articles upon the premises.*

In the case of Citizens Ins. Co. v. McLaughlin, 53 Pa. St. 485, cited on behalf of the petitioner, it was expressly stated in the policy that the in-

sured buildings were to be used as a "tannery and patent leather manufactory." The policy contained a provision permitting the keeping of benzol in bulk in a small shed detached from all other buildings, but nowhere else on the premises. It was shown that the use of benzol in small quantities was absolutely essential to the manufacture of patent leather, and that small quantities were for that purpose brought into the factory daily from the outside storage place. It was, therefore, held that as the policy expressly authorized the use of the building as a tannery and patent leather manufactory, and as such use necessarily involved the presence of small quantities of benzol, the policy was not invalidated by such necessary use.

In the case of McKeesport Machine Co. v. Ben Franklin Ins. Co., 173 Pa. St. 53, the policy on its face authorized the use of the insured building as a foundry, machine shop and blacksmith shop. By its terms it covered patterns while contained in the pattern shop. A fire occurred in the foundry, destroying some patterns which had been taken there from the pattern shop for use in making moulds. It was shown by evidence that it was essential to the conduct of the business that the patterns should from time to time be used in the foundry, and that the foundry could not be operated without them. It was, therefore, held that such a temporary location of the patterns was contemplated and that such patterns as were temporarily taken into the foundry for this purpose were covered by the policy.

In Lancaster Silver Plating Co. v. National Fire Ins. Co., 170 Pa. St. 151, the written specifications attached to the policy expressly provided in effect that the premises were to be used as a silver plating shop. The printed portion contained a general clause prohibiting the presence of gasoline. It was shown by the evidence that the use of gasoline was *necessary* in carrying on the business of silver plating, and it was therefore held that gasoline might be used in such quantities as were necessary in the business.

In the case of Lutz v. Royal Ins. Co., 205 Pa. St. 159, the policy expressly provided as follows: "Premises to be occupied as at present, or for purposes not more hazardous." It appeared that at the time the policy was issued, a part of the premises were occupied by a dealer in photographic supplies. It was proven that it was customary for dealers in photographic supplies to put up and sell in small packages flash-light powder, but that it was not customary for dealers to manufacture it on the premises. The Court said that as the policy authorized the occupancy of the building by a dealer in photographic supplies and the use of the building for that purpose, that such express provision attached to the policy authorized the customary selling of flash-light powder. The Court, however, proceeded to hold further that as the manufacture of flash-light powder was not a customary use, it was unauthorized, and a flash-light powder was an explosive within the meaning of the contract the policy was void.

In speaking of the two cases in the 53rd and the 170th Pennsylvania Reports above cited, the Court said:

> "We think there is a clear distinction in the facts between those cases and this. In both cases cited, one a leather factory, the other a silver plate factory, the prohibited articles benzol and gasoline were in constant use in the manufacture of the product of the factories, and absolutely necessary in small quantities in carrying on the business. We hel that if the use was a necessary one in carrying on the business it must be presumed that the intent of the parties was to insure the subject of the contract as it then existed, and as it would continue to be during the life of the policy notwithstanding the printed condition."

Decisions of this character may be justified on one of two grounds: First, if the written portion of the policy specially attached at the time of its issuance authorizes in specific language or in general terms articles prohibited by the printed portion, and thus conflict with the printed form, the written portions override the provisions of the printed form. Or if, as is now usual, the prohibition as to the keeping of certain hazardous substances is conditioned upon there being no provision permitting them endorsed on or added to the policy, the written specification authorizing a special use of the premises involving the use of certain substances is properly held to be such an endorsement or addition as is contemplated by the printed provision. It must be apparent that there is a wide difference between the cases cited and the case at bar. If the policy here involved had con-

tained a provision that the insured premises were to be used as miners' dwellings, and this had been followed by proof that it was a necessary and essential part of the occupation by miners that blasting powder should be kept upon the premises, the Pennsylvania cases would apply; or if the policy had contained a provision that the premises were to be occupied by miners with the right to keep such substances as miners usually keep, or if the premises had been in fact occupied by miners at the time the policy was issued, and as in the Lutz case the policy had contained an endorsement or attachment permitting the continued use for the purposes for which it was then in use, it may be that under Pennsylvania decisions, evidence would be admitted to show the custom of miners. But the policy here involved does not contain any endorsement or addition authorizing the use of this dwelling for miners, nor does it contain any endorsement or addition, even in general terms authorizing any use of the premises which customarily or necessarily involves the presence of blasting powder. The language of the policy is that it is to be used by tenants as dwellings, and we do not believe it will be claimed that it is either necessary or customary for tenants generally to keep blasting powder in their dwellings. This policy contained a provision which, properly read, prohibited the keeping or use of blasting powder upon the premises. It contained an express provision requiring that before such use should be permitted a permit must be endorsed on or added to the policy

in writing. It contained a further provision notifying the insured that no agent of the company had authority to consent to the keeping of any prohibited articles except by a written endorsement on or addition to the policy, and that the insured would claim no such privilege unless endorsed on or added in writing. There was absolutely nothing upon the face of the contract to warn this insurance company that it was consenting to the keeping of blasting powder upon the insured premises. There was nothing upon the face of the policy to indicate that it was being used as a miners' dwelling. For all that appears a risk of this kind may have been with this company a prohibited risk. It was shown by the evidence that the agent in no way notified the company of the use to which the building was afterwards put (p. 54). He testified that at some date not specified he told a special agent of the company that he had added to the premium on account of the proposed occupation by miners. It does not appear what the authority of this special agent was, or that the building was in fact being used at that time as a miners' dwelling, and in any event the special agent would have no greater authority to waive any conditions of the policy without a written endorsement than would the agent issuing the policy.

There is a statement in the dissenting opinion (p. 90) that this agent had been for some time insuring miners' tenements in this vicinity on behalf of this respondent. There is no basis in the record for this statement. The agent represented

a number of companies, but he did not testify that he had ever written a miners' risk for the St. Paul Fire and Marine Insurance Company. If he ever did so, it is quite plain from his testimony that the insurance company was not aware of the fact.

It is suggested in substance in the dissenting opinion in the Court below, that because blasting powder was not specifically prohibited, parol evidence was admissible to show that it was not intended to prohibit it. This is a somewhat novel doctrine. This policy either prohibited blasting powder or it did not. If it did prohibit it, then parol evidence was inadmissible to alter the contract in this respect whether the prohibition was in general or specific language. The contract as written is not obscure, there is no latent ambiguity requiring extrinsic evidence to explain, and there is no room for construction. We submit that this case not only comes within the rule stated in the Northern Assurance Company case, but that it is not necessary to go as far as the holding in that case, in order to sustain judgment for the respondent.

III.

THE QUESTION IN THIS CASE IS NOT GOVERNED BY THE DECISIONS IN THE STATE OF PENNSYLVANIA.

It is claimed by the petitioner that the law in force in the State of Pennsylvania forms a part of this contract and must be followed by this Court, and that the law in the State of Pennsylvania is that this policy as written did not prohibit blast-

ing powder. There are two answers to this contention

1. The principle involved is not a rule of substantive law, but a rule of evidence. The question is whether parol evidence is to be admitted to vary the terms of a written contract. While following the decisons of the Courts of the respective states in proper cases, this Court has never gone so far as to hold that the decisions of state Courts on a question of this kind must be followed in the federal Courts.

2. There has been no decision of the Supreme Court of Pennsylvania pointed out in which this precise form of contract has been construed. There is no decision in the State of Pennsylvania which justifies the admission of evidence outside of the contract under the facts of this particular case. The only decision in the State of Pennsylvania construing the expression "other explosives" as used in a similar form of policy is the case of Lutz v. The Royal Ins. Co., 205 Pa. 159, in which a much broader construction was placed upon those words than is contended for by the petitioner, and the Court held that flash-light powder was included within the expression "other explosives" where it appeared that it was an explosive of sufficient explosive force to be exceedingly dangerous to life and property, without regard to any comparison between its explosive force and that of other substances specifically described in the policy.

In the Case of Commonwealth Mutual Fire Insurance Co. v. Huntzinger, 98 Pa. St. 41, the court held that a warranty against other insurance was not waived because the agent issuing the policy knew of the existence of other insurance when the policy was delivered.

If there be any law of Pennsylvania which is to be read into this contract it should be the statute in substance declaring the blasting powder used by miners to be a high explosive, dangerous to life and property.

IV.

IF THIS CONTRACT DID NOT EXPRESS THE REAL INTENTION OF THE PARTIES AS IT WAS WRITTEN, THE REMEDY OF THE PETITIONER WAS TO SEEK ITS REFORMATION IN EQUITY.

It is manifest that the contract as written did not authorize the use of these premises for miners' dwellings, with the right to keep blasting powder upon the premises.

No doubt exists as to the meaning of the contract as written. If any doubt is raised by the extrinsic evidence admitted, that doubt is not as to the meaning of the language which the parties used, but at most is a doubt as to whether they wrote the contract as they intended it should be written.

This is almost conceded by the petitioner in her petition for re-argument in the Court below, where she says:

> "If the words 'other explosives' included blasting powder * * * then he (the agent) made one of two mistakes in making this contract of insurance, namely: In misinterpreting his own contract in that he believed its terms did not bar the storage of blasting powder, or if it did bar the storage of blasting powder he neglected to make the endorsement on the policy as required by the contract." (p. 97).

If it were the mutual intention of the insured and the insurer that the premises should be used for this purpose then the contract does not express that intention. The petitioner brought an action at law upon the contract as written, and then attempted to vary or alter its provisions by showing an intention not therein expressed. It may well be doubted whether such evidence as was offered on behalf of the petitioners, even if undisputed, would be sufficient to effect a reformation of this contract, but in any event she has mistaken her remedy.

A sequel to the case of Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, is found in the case of Northern Assurance Co. v. Grand View Building Association, 203 U. S. 106, where the insured, after being defeated in an action at law in an attempt to vary the terms of the contract as written, afterwards successfully prosecuted a suit to reform the policy. In an action at law upon the contract as written the defendant had a right to assume that no parol evidence could be received to vary the terms of this contract. The fact, therefore, that it did not

produce any evidence to contradict that offered by the plaintiff is sufficiently justified. In a suit for reformation of the contract the extent to which the written contract is alleged to differ from the actual contract should be charged in the petition, notice given of the alleged discrepancy, and the defendant given an opportunity to prepare and introduce evidence. In cases of this character instead of permitting an insured to introduce evidence in an action at law to vary the language of the written contract, he should be required to bring a suit to reform it.

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waived and expressly provides against modification by customs of trade or manufacture or by agents, and are unambiguous, courts cannot admit parol testimony to alter the written words of the contract. *Northern Assurance Company* v. *Grand View Building Association*, 183 U. S. 308.

151 Fed. Rep. 961, affirmed.

THE facts, which involve the liability of a fire insurance company on a policy of insurance, are stated in the opinion.

Mr. A. J. Truit, with whom *Mr. Frederic D. McKenney* and *Mr. B. M. Clark* were on the brief, for petitioner:

The action is governed by the law of Pennsylvania. 22 Am. & Eng. Ency. of Law, 1349; *Mann* v. *Salsberg*, 17 Pa. Super. Ct. 280; *Musser* v. *Stauffer*, 192 Pa. St. 398; Judiciary Act of 1789, c. 20, § 34. The knowledge and act of an insurance company's local agent connected with the risk is the knowledge and act of the company itself. *Caldwell* v. *Fire Assn.*, 177 Pa. St. 492; *Davis* v. *Insurance Co.*, 5 Pa. Super. Ct. 506, 512; *Phila. Tool Co.* v. *British Am. Assurance Co.*, 132 Pa. St. 236; *People's Ins. Co.* v. *Spencer*, 53 Pa. St. 353; *Humphreys* v. *Nat. Ben. Assn.*, 139 Pa. St. 264.

Evidence is admissible to show the understanding and intent of the parties and the customs connected therewith at the time the insurance was contracted. *Graybill* v. *Fire Ins. Assn.*, 170 Pa. St. 75; *Lancaster Co.* v. *Fire Ins. Co.*, 170 Pa. St. 151; *W. & A. Pipe Lines* v. *Insurance Co.*, 145 Pa. St. 346; *Helme* v. *Phila. Life Ins. Co.*, 61 Pa. St. 107; *Pittsburg Ins. Co.* v. *Frazee*, 107 Pa. St. 521; *Lutz* v. *Insurance Co.*, 205 Pa. St. 159; *Machine Co.* v. *Insurance Co.*, 173 Pa. St. 53; *Bently* v. *Insurance Co.*, 191 Pa. St. 276; *McCaffery* v. *Knights of Columbia*, 213 Pa. St. 609.

Where a policy of insurance is susceptible without violence of two interpretations that which is more favorable to the insured should be adopted. *Teutonia Fire Ins. Co.* v. *Mund*, 102 Pa. St. 94; 16 Am. & Eng. Ency. of Law, 862; 17 Am. & Eng. Ency. of Law, 25. The expression in a contract of one or

more things of a class implies the exclusion of all not expressed though all would have been implied had none been expressed. *Higgins* v. *Eagleton*, 13 Misc. (N. Y.) 223; *S. C.*, 68 N. Y. St. 82; *O'Niel* v. *Van Tassel*, 137 N. Y. 297; *Cree* v. *Bristol*, 66 N. Y. St. 518; *Hummerquist* v. *Swensson*, 44 Ill. App. 627.

Facts of public notoriety relating to the subject of a contract must be presumed to have been known to the parties. *Woodruff* v. *Woodruff*, 52 N. Y. 53; *McMillen* v. *Titus*, 222 Pa. St. 500.

The burden is on the insurance company to prove the existence of the condition and its violation. 16 Am. & Eng. Ency. of Law, 955; *Dougherty* v. *Insurance Co.*, 154 Pa. St. 386.

A parol waiver by an agent of the insurer of a condition of the policy is binding on the insurer. *Coursin* v. *Pa. Ins. Co.*, 46 Pa. St. 323; *McFarland* v. *Kit. Ins. Co.*, 134 Pa. St. 590.

The burden was on the insurance company to show that blasting powder, which was not among the prohibited articles named in the condition, was of the same nature, as dangerous and inflammable, as dynamite and gunpowder, and if the same as gunpowder that a quantity in excess of twenty-five pounds was kept on the premises.

There was no proof that benzine was of like nature with camphene or spirit gas. It is not a matter of which the court will take judicial notice. It is a question of fact, to be found by a jury upon evidence. *Mears* v. *Humboldt Ins. Co.*, 92 Pa. St. 15, 19; *Wood* v. *Northwestern Ins. Co.*, 46 N. Y. 421.

The universal rule of legal construction and interpretation is that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration and to be construed as including only all other articles of the like nature and quality. *Sandinan* v. *Breach*, 7 B. & C. K. B. Reps. 100; *Brooks* v. *Lord Kensington*, 14 Eng. Ruling Cases, 723; *Alabama* v. *Montague*, 117 U. S. 602; *United States* v. *Celluloid*, 82 Fed. Rep. 627; *Newport &c. Co.* v. *United States*, 61 Fed. Rep. 488; *Crystal Sp. Distillery Co.* v. *Cox*, 49 Fed. Rep. 555;

Erwin v. *Jersey City*, 60 N. J. L. 145; *Livermore* v. *Camden County*, 29 N. J. Law, 247; *King* v. *Thompson*, 87 Pa. St. 369; *Renick* v. *Boyd*, 99 Pa. St. 555; *Pardee's App.*, 100 Pa. St. 412; *Bucher* v. *Commonwealth*, 103 Pa. St. 528.

Mr. William D. Mitchell, with whom *Mr. W. K. Jennings*, *Mr. D. C. Jennings*, *Mr. Jared How*, *Mr. Pierce Butler* and *Mr. George Hoke* were on the brief, for respondent:

To keep, use or allow blasting powder upon the premises was clearly prohibited by the terms of the written contract, and no application of the rule of *ejusdem generis* can exclude blasting powder from the words "other explosives" in the policy. *Renick* v. *Boyd*, 99 Pa. St. 555; *United Ins. Co.* v. *Foote*, 22 Ohio St. 340. See statutes, 1 Mass. Rev. Laws, 1902, p. 880, c. 102, § 105; So. Car. Civ. Code, 1902, § 2156.

A violation by a tenant has same effect as violation by the insured. *L'pool & Lon. & Globe* v. *Gunther*, 116 U. S. 113; *Diehl* v. *Insurance Co.*, 58 Pa. St. 443.

The condition included even a temporary presence of the prohibited article. 180 Pa. St. 257. Extrinsic or parol evidence is not admissible to alter the meaning of the written contract. *Northern Ins. Co.* v. *Grand View Assn.*, 183 U. S. 308; *West. Assn. Co.* v. *Rector*, 85 Kentucky, 294; *Citizens' Ins. Co.* v. *McLaughlin*, 53 Pa. St. 485, distinguished, and see *McKeesport Co.* v. *Insurance Co.*, 173 Pa. St. 53; *Lutz* v. *Royal Ins. Co.*, 205 Pa. St 159.

The question in the case is not governed by the decisions in the State of Pennsylvania. *Commonwealth* v. *Huntzinger*, 98 Pa. St. 41. If the contract did not express the real intention of the parties as written the petitioner's remedy is to seek its reformation in equity. *Nor. Ins. Co.* v. *Grand View Assn.*, 203 U. S. 106.

Mr. Justice McKenna delivered the opinion of the court.

This is an action to recover the sum of $2,600, with interest, upon a fire insurance policy for the value of a building de-

stroyed by fire. The action was brought in the Court of Common Pleas of Jefferson County, Pennsylvania, and by the insurance company, the respondent herein removed to the United States Court for the Western District of Pennsylvania.

Plaintiff's statement, to use the local name for her pleading, alleged a contract of insurance whereby the insurance company insured, for the term of three years, against direct loss by fire, "a two-story shingle-roofed building, 28 x 96, and additions," etc., to be occupied by tenants as dwellings, and situated in Punxsutawney, Jefferson County, Pennsylvania. Payment of the premium and charges was alleged, also the total loss of the building by fire. A copy of the policy was attached to the statement and made a part of it. The policy contained the following covenant:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding 25 lbs., in quantity, naphtha, nitro-glycerine, or other explosives."

The policy also contained the following covenant:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The case was tried to a jury and resulted in the verdict for the plaintiff, upon which judgment was duly entered. A motion for a new trial was denied. The judgment was reversed by the Circuit Court of Appeals. 151 Fed. Rep. 961. This writ of certiorari was then allowed. 209 U. S. 543.

The question in the case is the effect of the covenants which we have quoted. It was raised in the Circuit Court by objection to certain testimony, which was admitted, and the denial of certain instructions which were requested.

The property is situated in the coal mining regions of Pennsylvania, and the testimony shows that an explosion preceded or was coincident with the fire as its cause or effect. Indeed, it seems to be clear that the explosion was caused by one of the tenants throwing lighted "squibs" in the air "for fun." And there was testimony that it was the custom of miners to keep more or less blasting powder in their dwellings. The custom seems to have arisen on account of a law of Pennsylvania, which provides that "no powder or high explosive shall be stored in any mine and no more of either article shall be taken into the mine at any one time than is required for any one shift unless the quantity be less than five pounds. . . ."

In supplement to this testimony the Circuit Court admitted, over the objection of the company, the testimony of the agent who placed the insurance upon the property, to the effect that he had taken considerable risks as agent for defendant company on miners' dwellings; that he knew of the custom of miners to keep blasting powder in their dwellings; that he knew that the building insured was in seven compartments, "seven miners' dwellings," to be occupied by seven different families, and that he "increased the rate by reason of the fact that this building was to be occupied by miners, and having knowledge that they kept more or less blasting powder about their dwellings." And he also testified that, after he had placed the risk, the special agent of the company went with him, looked at the risk and said it was satisfactory, after

having made inquiry as to the rate. He expressed the increase in percentage as "one and a quarter for one year, or two and a half for two years." He also charged an extra premium for finishing.

He increased the premium, he further testified, because he "thought it was going to be occupied by coal miners," and "because there was seven of them." The increase was from one and a quarter per cent to two and a half per cent, but he did not know what he would have charged if the building had not been for coal miners. And further, that he was not told that the building was to be occupied by coal miners, he knew that from his experience in the business. Mrs. Penman did not tell him, nor did he tell her that he had increased the rate, because she might possibly have it occupied by miners, but he told the special agent of the company "that that entered into the calculations." He did not report it on the form because it was not his custom to do so. To the question whether it was special business he was "performing rather than acting for the company," he answered, "yes."

The policy recited that the building insured was "in process of erection with privilege to finish and to be occupied by tenants as dwellings," and that "in consideration of the extra premium of three and 90–100 dollars ($3.90) 30 days' permission is hereby granted to finish the building." There was evidence showing that blasting powder is a lower degree of explosive than gunpowder or dynamite, and that the latter is a higher degree than gunpowder.

In view of this testimony the Circuit Court decided, as it said, that though ordinarily it was "the duty of a court to construe a written instrument and instruct the jury what its terms meant," he would leave to the jury "as a question of fact" for it "to determine, whether, under the evidence and the facts proven here, blasting powder" was "included in the term 'other explosives.'" Entertaining that view, the court refused to instruct the jury, as requested by the company, "that under the evidence the verdict should be for the

defendant." The court refused other requests which were based on the controlling effect of the policy.

In passing upon the motion for a new trial the Circuit Court reasserted the view that it was for the jury to "determine whether blasting powder was one of the prohibited articles which was to invalidate the policy." The court observed: "It was contended by one side that it was embraced under the term 'other explosives;' by the other, that it was not." The court further said: "While of course blasting powder is an explosive, and is therefore covered by the generic term 'other explosives,' yet the fact that other explosives of the general character of blasting powder, and those of a much more dangerous character than blasting powder, to wit, dynamite and gunpowder, of which twenty and five pounds were permitted, were specified, it was contended that the express mention of these more dangerous powders evidenced an intent not to cover the less dangerous article of blasting powder under the general term 'other explosives.'" To the last contention the court, as we have seen, yielded, and rejected the case of *The Northern Assurance Co.* v. *Grand View Building Asso.*, 183 U. S. 308, as not decisive, by saying that "in that case there was no question as to what the policy provided, in the present the crucial question was as to what the policy in question covered by the term 'other explosives.'"

The majority of the Circuit Court of Appeals took another view. It found nothing obscure in the language of the policy, and nothing therefore to excuse the Circuit Court from exercising the duty of construing it. Answering the contention that the words "or other explosives" should not be held to include explosives of lower power than gunpowder or dynamite, it was said: "Such an application of the maxim *noscitur á sociis* is too narrow."

It was pointed out that the enumeration of explosives included other explosives than gunpowder and blasting powder, and that there was nothing in the record to show their relative degrees of power, nor whether they or any of them were

of less explosive power than gunpowder or dynamite. Their relative power, it was said, was not a matter of common knowledge, and if the general words "or other explosives" were to be or could be limited by such relation or their relation to blasting powder, the burden was upon the plaintiff to show it, as those words "in their literal and natural meaning included blasting powder." It was hence concluded that "to hold, under the present proofs, that the general words 'or other explosives' do not include blasting powder merely because it is a less dangerous explosive than dynamite or gunpowder, when it may be more dangerous than Greek fire, benzine, benzole, ether, gasoline, or naphtha, is virtually to decide arbitrarily that no meaning or effect shall be given to the general words. We are satisfied that this cannot be done, and that, as the proofs stand, the general words include blasting powder."

The court thus deciding that the words of the policy included blasting powder, further decided that the Circuit Court erred in admitting parol testimony to vary its terms, and also erred in not directing a verdict for the company.

A member of the court dissented from both propositions. His argument was elaborate and would not be adequately represented by condensation. It asserted the view of the Circuit Court and the contention of the plaintiff. It considered that by the rule of *ejusdem generis* blasting powder was not covered by the words "other explosives," and by them were meant explosives of the same power as those enumerated, which it seems to have been assumed blasting powder was not. It was considered besides that the words could be given a meaning by the custom of miners and the industrial conditions which existed in the neighborhood, and also from the knowledge and conduct of the company's agent when the insurance was placed. Cases from Pennsylvania were cited to support that proposition, of which we may select as representative *Machine Company* v. *Insurance Company*, 173 Pa. St. 53, where the policy of insurance on two buildings, one a

foundry and machine shop, and the other a pattern shop, was considered. The policy covered the patterns in the pattern shop by these words, "on patterns therein one thousand dollars." The pattern shop was from fifteen to twenty feet from the foundry in which the fire occurred, and in which the patterns were destroyed, where they were taken the evening before the fire for actual use next day in accordance with the orders and customs in that and other shops in the use of patterns. It was found by a jury returning a special verdict that such use was a reasonable one and answered the convenient operation of such plants, and that the agent of the defendant company examined the shops and patterns and buildings before taking the insurance. The court said:

"The policy sued on in this case was issued to a manufacturing company and covered the buildings, machinery, fixtures and appliances in daily use in the business of the company. The rules of construction applicable to such a contract of insurance are well settled. The object of the contract is indemnity against the loss by fire of the business plant, or any portion of it, while used and occupied by the owners in the manner and for the purposes for which it was designed. If its provisions are susceptible of two or more interpretations, that one should be adopted that will make the contract effective for the protection of the insured. In other words, the contract should be liberally construed in aid of the indemnity which was in contemplation of the parties who made it. *W. & A. Pipe Lines* v. *Insurance Co.*, 145 Pa. 346.

"Again, an insurance company issuing a policy upon a business plant, or any portion of it, is chargeable with knowledge of the customary methods of conducting the business in which the property insured is used. *Pipe Lines* v. *Insurance Company, supra.* This rule is not limited to insurance upon property in use for manufacturing or other business purposes. It was applied in the construction of a policy issued upon a dwelling house in *Doud* v. *Citizens' Insurance Company*, 141 Pa. 47, and in *Roe* v. *Dwelling House Insurance Co.*, 149 Pa.

94. It was applied to a policy of insurance upon a horse in *Haws* v. *Fire Association of Phila.*, 114 Pa. 431. Still another rule of construction is that the circumstances surrounding the making of the contract and affecting the subject to which it relates form a sort of context that may properly be resorted to for aid in determining the meaning of the words and provisions of the contract. *Bole, Assignee*, v. *New Hampshire Fire Ins. Co.*, 159 Pa. 53; *Graybill* v. *The Penn Township Mutual Fire Ins. Co.*, 170 Pa. 75."

We have stated the rulings of the courts below, because they accurately exhibit the contentions of the parties and the questions for decision and with such fullness of argument that there is not much more for this court to do than to select and concur. The Court of Appeals decided, as we have seen, that under the terms of the policy blasting powder could not be "kept, used or allowed" on the insured property, and that such prohibition was not waived by the knowledge and acts of the company's agent. We concur in this, and we think the reasoning by which it was supported is conclusive. The rule of *ejusdem generis* is a rule of interpretation, and granting, *arguendo*, it should be applied more liberally to contracts of insurance than to contracts of other kinds, yet we think it would be giving it too much force to yield to the contention of petitioner. Blasting powder is an explosive, and one of power; it is therefore capable of producing the result that the provision of the policy was intended to guard against. We are given no tests, as the Court of Appeals said, and we certainly may not assume them, of a comparison of it with the explosives which are enumerated, except dynamite and gunpowder. The law of Pennsylvania, as we have seen, has given it character and has guarded against its destructive force.

We think also that the policy furnishes the only way by which its terms can be waived. It provides against modifications by the usage or custom of trade or manufacture. It guards against any acts of waiver of its conditions or a change of them by agents. It provides that such waiver or change

"shall be written upon or attached" to the policy. The company could have used no words which would have been more explicit. There is no ambiguity about them. Parol testimony was not needed nor admissible to interpret them. They constituted the contract between the company and the insured. No agent had power to change or modify that contract except in the manner provided. This was decided in *Northern Assurance Company* v. *Building Association*, *supra*. Any other ruling would take from contracts the certain evidence of their written words and turn them over for meaning to the disputes of parol testimony.

The Pennsylvania cases cited by the petitioner do not militate with the rule there announced. If they did, it might be open to controversy how far they were binding on this court. *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349.

Judgment affirmed.